TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 846.

HARRY T. GRAHAM, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, ET AL., PETITIONERS,

vs.

ALFRED I. DU PONT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED FEBRUARY 12, 1923.
CERTIORARI AND RETURN FILED MARCH 22, 1923.

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INDEX.

Record from United States District Court for the District of Delaware—Continued.

1 UNITED STATES OF AMERICA.
District of Delaware, ss.:

Be it remembered, that at a District Court of the United States of the District of Delaware, begun and held at the United States court-house and post-office building, in the city of Wilmington, in the said district of Delaware, at the time and place required by law, among other, the following proceedings were had, to wit:

ALFRED I. DUPONT, COMPLAINANT, *vs.* HARRY T. GRAHAM, INDIVIDUALLY AND AS COLLECTOR of internal revenue for the district of Delaware, and JOHN W. HERING, INDIVIDUALLY AND AS UNITED States collector of internal revenue for the district of Delaware, and his successor in office, defendants.	No. 547. In equity.

Docket entries.

Jan. 30, 1922. Bill of Complaint, with Exhibit "A," filed: same day subpœna issued, returnable February 20, 1922.
Jan. 30, 1922. Affidavit of Alfred I. duPont, filed.
Jan. 30, 1922. Certificate of disqualification of Hon. Hugh M. Horris, filed. (Exit copy to circuit judge.)
Jan. 31, 1922. Motion for preliminary injunction filed: same day order setting same down for hearing February 14, 1922, at 10 o'clock a. m., that defendant file his
2 affidavits on or before February 8, 1922: that complainant file reply affidavits on or before February 11, 1922: and that marshal serve defendant, &c.: same day said order filed. (Exit copy to marshal.)
Feb. 3, 1922. Defendant appears, by James H. Hughes, jr., Esq., United States attorney: same day præcipe filed.
Feb. 6, 1922. Order continuing hearing on motion for preliminary injunction until March 3, 1922, and extending time for filing affidavits, &c.: same day said order filed. (Exit copy to solicitors.)
Feb. 8, 1922. Marshal returns on subpœna, copy of motion and copy of order, "Served," &c.: same day said writ and copies filed.
Feb. 14, 1922. Motion to dismiss bill, filed.
Feb. 14, 1922. Affidavit of Harry T. Graham, with Exhibits Nos. 1 to 19, inclusive, filed by defendant.
Feb. 16, 1922. Order extending time for filing answer until March 10, 1922: same day said order filed. (Exit copy to solicitors.)
Mar. 3–4, 1922. Hearing on motion for preliminary injunction and motion to dismiss bill of complaint.

June 13, 1922. Opinion of court, filed.
June 20, 1922. Order extending time for filing answer until thirty days after entry of decree granting injunction, &c.; same day said order filed.
June 27, 1922. Motion of plaintiff for leave to amend bill, filed.
June 27, 1922. Order that John W. Hering, individually and as United States collector of internal revenue for the district of Delaware, be made party defendant;
3 that motion to dismiss bill of complaint be overruled and that defendants be enjoined, &c.; same day said order filed.
July 25, 1922. Petition of defendants, with assignments of error, filed; same day order allowing appeal; same day said order filed.
July 25, 1922. Citation issued.
July 25, 1922. Order extending time for filing answer; same day said order filed.

4 *Bill of complaint.*

(Filed January 30, 1922.)

In the District Court of the United States for the District of Delaware.

(Title omitted.)

Bill in equity.

To the judge of the District Court of the United States for the District of Delaware:

Complainant, Alfred I. duPont, complains and says:

1. That he is a citizen, resident, and inhabitant of Brandywine Hundred, New Castle County, in the State and judicial district of Delaware.

2. That defendant is a citizen, resident, and inhabitant of New Castle County and judicial district of Delaware, and is collector of internal revenue for the United States in and for the district of Delaware.

3. That this is a suit of a civil nature where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and arises under the laws of the United States.

4. That the E. I. duPont de Nemours Powder Company (hereinafter called the New Jersey Company) was incorporated in the year 1903 under the laws of the State of New Jersey, and was engaged up to the 1st of October, 1915, in the manufacture and sale of powder, dynamite, and other explosives, and on the 1st day
5 of October, 1915, the New Jersey Company, in pursuance of "a plan of financial reorganization," transferred its assets as

an "entirety" and "as a going concern" to E. I. duPont de Nemours & Company (hereinafter called the Delaware Company) organized under the laws of the State of Delaware, and which latter company thereafter conducted the same business.

5. That complainant on September 30, 1915, and from the date of the organization of the New Jersey Company was the owner of 37,767 shares of the common stock of said company, and from the year 1912 all of said shares of stock stood in his own name on the books of the company.

6. That in consideration of the transfer of its assets, good will, etc., to the Delaware Company, the New Jersey Company received on October 1, 1915, 596,617 shares of the debenture stock and 588,542 shares of the common stock of the Delaware Company, each share of debenture and common stock being of the par value of $100.00, and making a total in par value of $118,515,900, of which stock so received $30,234,600, in par value, of the debenture stock was used in taking up, share for share, and dollar for dollar, the preferred stock and thirty-year bonds of the New Jersey Company, and the remainder of the debenture stock, to wit, $29,427,100 in par value, was held in the treasury of the New Jersey Company. The common stock of the Delaware Company, of the par value of $58,854,200, was distributed immediately among the common stockholders of the New Jersey Company, each stockholder receiving two shares of the common stock of the Delaware Company for each share of common stock held by him in the New Jersey Company. In this distribution complainant received, on or about October 1, 1915, a total of 75,534 shares of the common stock of the Delaware Company, of the par value of $100 per share.

6 7. That when this plan of financial reorganization was proposed to the stockholders of the New Jersey Company, complainant objected thereto on the grounds, among others, that (1) there was no necessity or occasion for such reorganization, and (2) that the assets proposed to be turned over to the Delaware Company did not in value justify the issue by that company of this stock in the amount of $118,515,900 par value; but complainant was informed by the treasurer of the New Jersey Company that the latter objection could be met by writing up on the books of the company the value of profits which the company expected to make in the manufacture of powder and explosives under certain contracts with the Allies engaged in the European war, thus making the assets appear on the books equal on October 1, 1915, to the par value of the stock issued by the Delaware Company. The contracts aforesaid were unperformed and on a great number of them deliveries were not to be begun until February, 1916.

Complainant continued, however, to object to such reorganization until the same was approved by two-thirds in amount of the stockholders, and then he acquiesced therein at the personal request of the officers of the company to avoid any appearance of dissension.

Complainant is informed by an examination of the books that the value of profits which the company expected to make on the contracts aforesaid was in fact written up on the books of the company on or about October 1, 1915, in the sum of $29,152,116.75, in order to apparently show on the books of the company the assets to be equal in value to the common stock of a total par value of $58,854,200 of the Delaware Company, at its par value of $100 per share.

8. That on March 1, 1916, complainant, as required by the act of October 3, 1913, made his personal return of total net income accruing to him during the calendar year 1915, and to said
7 return, as complainant believes, attached a statement in writing fully setting forth the entire transaction under which he received the 75,534 shares of common stock of the Delaware Company aforesaid, and protesting "against the inclusion of said stock in his income tax for said year" 1915. A copy of said statement is hereto attached as Exhibit A and as a part of this bill.

9. Complainant is informed, believes, and therefore charges that 95% of the stockholders, including all of the large stockholders of the Delaware Company, attached a like statement to their and each of their personal returns of total income for the year 1915, filed on March 1, 1916. Complainant's return aforesaid was duly filed by him with the collector of internal revenue for the district of Delaware on March 1, 1916, and was duly forwarded by said collector as the law requires to the Commissioner of Internal Revenue at Washington, District of Columbia.

10. That on the 30th day of June, 1916, the entire tax for which complainant was liable by reason of net income accruing to him in the calender year 1915, was due and payable to the collector of internal revenue for the district of Delaware, and on or about said date complainant paid to said collector the entire amount due by him as aforesaid as and for tax upon personal income accruing to him in the year 1915, as shown by the return made by complainant as aforesaid.

11. Complainant is informed, believes, and therefore charges that the Commissioner of Internal Revenue was only authorized by law to make a return for complainant charging him with receiving additional income to that shown upon his return for the year 1915, in case the return filed by complainant on March 1, 1916, was "false or fraudulent," and in case the return was "false or fraudulent" in law, then the Commissioner of Internal Revenue was not authorized by law to "make a return" for complainant or to collect a tax
8 from complainant in addition to that shown on his return and paid by him, unless the commissioner makes such return for complainant and issues an assessment thereon "within three years after said return" made by complainant is "due," to wit, within three years after March 1, 1916; and complainant charges that neither the commissioner nor the collector or deputy collector made such return for complainant upon which to issue or base an additional assessment within three years after the said March 1, 1916.

12. Complainant further shows that upon his making his return on the 1st of March, 1916, with the statement (Exhibit A) attached thereto, the collector of internal revenue for the district of Delaware, and the Commissioner of Internal Revenue were both fully informed as to the shares of common stock of the Delaware Company received by complainant on October 1, 1915, and the circumstances under which the said stock was received, and the commissioner was only authorized by law to "make a return for complainant," and assessment thereon, "within three years" after March 1, 1916, when complainant's return was made and when the commissioner was furnished with full information as to the common stock of the Delaware Company received by complainant and the circumstances under which it was received. Complainant charges that neither the Commissioner of Internal Revenue, nor the collector or deputy collector, made a return for complainant, and no assessment was made against him for additional income tax for the year 1915 within three years after March 1, 1916.

13. Complainant says that he made his return on March 1, 1916, in accordance with the act of October 3, 1913, of personal income accruing or received by him in the calendar year of 1915; that said return was not "false or fraudulent" in any sense other than that it was incorrect; that the Commissioner of Internal Revenue discovered on March 1, 1916, from complainant's return and the statement thereto attached, that he had not included in his return 75,534
9 shares of common stock of the Delaware Company received by him on October 1, 1915; that neither the Commissioner of Internal Revenue, nor the collector or deputy collector, has made a return for complainant of income received by him for the year 1915, and no assessment could lawfully be made against complainant until the commissioner or collector or deputy collector first made such return for complainant; and that no return was made for complainant within three years from March 1, 1916, the date at which the commissioner was informed that complainant received the shares of common stock of the Delaware Company aforesaid; that no return was made for complainant, and no assessment for additional income made by the commissioner against complainant within three years after the return of complainant was "due" and filed by complainant on March 1, 1916. And thereupon complainant charges that no basis existed upon which the commissioner was authorized to assess additional income tax against complainant for the year 1915, and that under the circumstances above set forth the commissioner was not authorized by law after the 1st of March, 1919, to assess complainant with additional income tax for the year 1915 by reason of his having received the common stock of the Delaware Company aforesaid.

14. Complainant further says that on the 1st day of January, 1920, he received the first communication from the collector of internal revenue indicating any purpose to charge complainant with additional income tax for the year 1915. That on that date he received

through the mails a notice and demand dated December 31, 1919, that complainant pay to H. T. Graham, collector of internal revenue at Wilmington, Delaware, on or before January 10, 1920, the sum of $1,576,015.86 for income tax for the year 1915; upon receipt of which said notice and demand complainant immediately wrote to the collector of internal revenue at Wilmington, Delaware, protesting against the bill aforesaid, on the ground that the demand for payment by him of additional income tax for the year 1915 was
10 improper and illegal under the act of October 3, 1913, and that the commissioner had no power under the law to demand the payment of the sum above mentioned or any part thereof.

Whereupon, on the 24th of January, 1920, complainant was informed in a letter from the Acting Assistant to the Commissioner of Internal Revenue that the commissioner claimed that he was liable for the additional tax in the sum of $1,576,015.86, and demanding payment thereof.

Complainant charges that no return had been made for him by the commissioner in accordance with the terms of the act of October 3, 1913; and complainant is informed and therefore charges that the notice and demand dated December 31, 1919, aforesaid was made upon the complainant charging that he had received on the 1st of October, 1915, 75,534 shares of the common stock of the Delaware Company in accordance with the circumstances above set forth, and further, that said stock on that day was of the fair value of $347.50 per share, and that therefore complainant had received $26,248,065 of personal income in the year 1915 in addition to the income shown upon the return filed by complainant as aforesaid. Complainant charges that the commissioner had no power in law to make the notice and demand upon complainant for the payment of the additional tax aforesaid, and that the commissioner acted without warrant of law for the following reasons, to wit:

1. The commissioner or collector or deputy collector at no time made a return upon information for complainant as to additional income received by him in the year 1915.

2. That under the act of October 3, 1913, and the law, no assessment for additional income tax could be made by the Commissioner of Internal Revenue until "a return upon information" had been made for complainant.

11 3. That the notice and demand dated December 31, 1919, was made upon complainant more than three years after the commissioner was informed and discovered that complainant had received the 75,534 shares of the common stock of the Delaware Company, as aforesaid.

4. That said notice and demand dated December 31, 1919, was made more than three years after the 1st of March, 1916, at which date complainant's return of income accruing to him for the year 1915 was "due" and actually filed by complainant.

Therefore, complainant charges that in making the demand upon complainant for the sum of $1,576,015.86 as additional income tax for

the year 1915, the Commissioner of Internal Revenue acted unlawfully, illegally, and without warrant of law.

15. Complainant was further informed by letter dated January 24, 1920, from the Acting Assistant to the Commissioner of Internal Revenue, that the commissioner renewed his demand for the payment of the $1,576,015.86 by complainant as additional income tax, and informed complainant that unless he paid the same collection would be made thereof by the collector for the district of Delaware "through distraint": and thereupon complainant filed a claim in abatement of said tax, which said claim was duly referred to the Commissioner of Internal Revenue and has been overruled by him.

16. That on November 23, 1921, Congress passed an act known as "the revenue act of 1921." By said act, section 250–d, it is provided as to demands for taxes made under that act "for prior taxable years or under any prior income excess-profits or war-profits tax acts" or under section 38 of the act approved August 5, 1909, that:

"No suit or proceeding for the collection of any such taxes due under this act or under any prior income excess-profits or
12 war-profits tax acts or of any taxes due under section 38 of such act of August 5, 1909, shall be begun after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this act."

Complainant charges that no "suit or proceedings" was "begun" against him prior to the passage of the act of November 23rd, 1921, for the collection of any additional income tax for the year 1915, and that he has not consented in writing or otherwise to any "determination, assessment, and collection" of any additional income tax upon him for the year 1915. And complainant therefore charges that any claim of additional income tax for the year 1915 is, under the provision of the act aforesaid of November 23, 1921, barred after five years from the 1st day of March, 1916, the day upon which his return for 1915 was filed, and that no "suit or proceeding" can be lawfully begun against him for the collection thereof after the 1st day of March, 1921.

17. Complainant further shows that by section 1320 of the act known as "the revenue act of 1921," approved November 23, 1921, it is provided:

"That no suit or proceeding for the collection of any internal-revenue tax shall be begun after the expiration of five years from the time such tax was due, except in the case of fraud with intent to evade tax or willful attempt in any manner to defeat or evade tax. This section shall not apply to suits or proceedings for the collection of taxes under section 250 of this act, nor to suits or proceedings begun at the time of the passage of this act."

Complainant further says that any tax for which he was liable on account of net income accruing to him for the year 1915 was due and payable "on or before the 1st day of June," 1916, and complainant shows that he has not been guilty of "fraud with intent to

13 evade tax," nor has he been guilty of "willful attempt in any manner to defeat or evade tax"; and complainant shows that no "suits or proceedings" had been "begun" against him for the collection of any additional income tax for the year 1915 at the time of the passage of "the revenue act of 1921," approved November 23, 1921; and, therefore, complainant charges that any "suit or proceeding" by the Commissioner of Internal Revenue or the collector of internal revenue for the district of Delaware against complainant for additional income tax for year 1915 is forever barred by the provisions aforesaid of the act of 1921.

18. Complainant charges that the collector of internal revenue for the district of Delaware intends to proceed by distraint or otherwise to collect from complainant the $1,576,015.86 referred to in the notice and demand of December 31, 1919, and that the said collector will proceed to collect the same by distress and sale of complainant's lands and freehold in the district of Delaware, and that said demand on the part of the Commissioner of Internal Revenue constitutes a cloud upon the lands and freehold of complainant situate in Brandywine Hundred, New Castle County, Delaware; and that if the commissioner proceeds to collect said demand by distress and sale of complainant's land and freehold that the loss of his said freehold by means of a tax sale would be an irreparable damage to complainant. That by reason of the long delay on the part of the Commissioner of Internal Revenue, the 75,534 shares of common stock of the Delaware Company received by complainant on October 1, 1915, and now held by complainant are not salable, that no market can at present be found for said stock, and that complainant will be unable by the use of said stock to secure the money to prevent the sale of his freehold estate upon such distraint.

Complainant further shows that the act of 1921 and the sections above quoted forever bar the Collector of Internal Revenue from proceeding by distraint to collect the $1,576,015.86, or any part
14 thereof, claimed by said Commissioner of Internal Revenue, but if the said collector should collect said tax by unlawful distraint upon complainant's property in violation of his duty, and in violation of the act of November 23, 1921, aforesaid, complainant's right to recover in a suit at law the said amount unlawfully collected and distrained as aforesaid by the collector is so doubtful that complainant would be irreparably injured and damaged by permitting the distraint upon his property as aforesaid.

Complainant says that section 3225 of Revised Statutes, as amended by the "Revenue act of 1921," is as follows:

"When a second assessment is made in case of any list, statement, or return which in the opinion of the collector or deputy collector was false or fraudulent, or contains any understatement or undervaluation, such assessment shall not be remitted, nor shall taxes collected under such assessment be refunded or paid back or recovered by any suit unless it is proved that such list, statement, or return was

not willfully false or fraudulent, and did not contain any willful understatement or undervaluation."

This same amendment of section 3225 was in the "revenue law of 1918."

Therefore, if by distraint upon complainant's property the collector should collect the additional tax claimed by him for the year 1915, by sale of complainant's property, or if complainant should pay the same under duress and under protest, complainant would be deprived of the right given him by the act of November 23, 1921, and he would be barred from recovering the money collected by the collector, as aforesaid, in case it should be held that the return made by complainant on March 1, 1916, was "willfully" incorrect and in that sense "willfully" false, and would further be deprived of the right given him by the act of November 23, 1921, if it should be held
15 that complainant's return was willfully incorrect and that it contained a willful understatement of income, in that the Supreme Court in the case of the United States vs. Phellis has held that the common stock received by the complainant on October 1, 1915, was taxable under the act of October 3, 1913, and, therefore, under this decision of the Supreme Court complainant's return made on March 1, 1916, was incorrect in not including said common stock.

The act of November 23, 1921, gives to the complainant the right to hold his property free of any suit or proceeding by the said collector by levy upon and sale of the same for income tax claimed against complainant for the year 1915, and if the collector can proceed by distraint to collect the same, complainant is irreparably deprived of the forum in which to assert his right under the said act of 1921 or to recover the tax collected by the collector in violation of the act of November 23, 1921.

Complainant further charges that the 75,534 shares of common stock of the Delaware Company received by him on the 1st day of October, 1915, was not of a fair value in excess of $50.00 per share, and yet the Commissioner of Internal Revenue has charged complainant with the value thereof as of October 1, 1915, at $347.50 per share.

19. Complainant says that the return required of him by the act of October 3, 1913, of net income accruing to him in the year 1915, was due on March 1, 1916, and complainant on that day made his return as required by law.

Complainant further shows that by section 3226 of the Revised Statutes, as amended by section 1318 of the "revenue act of 1921," it is provided that—

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed
16 to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or for credit has been duly filed with the Commissioner of Internal Revenue, according to the pro-

visions of law in that regard or the regulations of the Secretary of the Treasury established in pursuance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum."

Complainant further shows that by section 252 of the revenue act of 1918, it is provided—

"That if upon examination of any return of income made pursuant to * * * the act of October 3, 1913, * * * it appears that an amount of income * * * tax has been paid in excess of that properly due then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income * * * taxes or instalments thereof then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer. Provided that no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer."

The above section 252 of the act of 1918 was reenacted as section 252 of the "revenue act of 1921."

Complainant therefore says that if the collector of internal revenue for the district of Delaware is now permitted to collect the
17 $1,576,015.86 as and for additional income tax against complainant for the year 1915 that complainant, by the delay of the Commissioner of Internal Revenue in assessing and collecting such tax, the amount whereof is in excess of that properly due, is not permitted under the provisions of law above set forth to file with the commissioner a claim for refund of the excess amount of said tax properly due, in that more than five years since the date "when the return was due" by complainant on March 1, 1916, have elapsed; and by the delay of the commissioner, complainant will be deprived of any remedy for the collection and return of the excess taxes collected from complainant for the year 1915.

20. Complainant further says that while the law gives him a right of action to recover taxes erroneously or illegally assessed or collected, provided he proceeds within the proper time by claim for refund thereof, yet the revenue act of 1921 does not give to the complainant a right of action to recover taxes which are collected by distraint or otherwise by the collector of internal revenue in violation of the limitations provided by the revenue act of 1921; and if the collector of internal revenue for the district of Delaware should proceed in violation of the revenue act of 1921, and collect the income tax for the year 1915 against complainant by the sale of his property or otherwise, it is very doubtful whether complainant would have a right of action against the collector to recover the amount so collected, on the ground that the collector had proceeded in violation of the limitations contained in the "revenue act of 1921."

21. Complainant further shows that while section 3224 of the Revised Statutes of the United States provides that—

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court,"

that the provision of this section must be read in the light of the subsequent act of Congress of November 23, 1921, which for-
18 ever bars the Commissioner of Internal Revenue from the assessment or collection of any tax against complainant for income received by him in the year 1915, and Congress has modified to this extent section 3224 of the Revised Statutes, and complainant is entitled to the full benefit of his right given by that act, and to prevent in a court of equity the distraint upon his property by the collector of Internal Revenue for the district of Delaware for the collection of the tax against him for the year 1915.

22. By the act of Congress of November 23, 1921, it was provided that "no suit or proceeding shall be begun" to collect the claim of the Commissioner of Internal Revenue against complainant for additional income tax for the year 1915, and this is a right given to complainant to hold his property free from distraint by the collector for the collection of said claim.

Complainant says that he is now threatened with such distraint, and that he has no other remedy to enforce his said right except in this court of equity, and without the aid of this court on the present bill complainant will be forever deprived of the right given him by the act of Congress aforesaid and he will be irreparably damaged.

Inasmuch, therefore, as complainant is without sufficient remedy at law, and that the distraint against him by the collector of internal revenue for the district of Delaware for the collection of $1,576,015.86, or any part thereof, would irreparably injure complainant and deprive him of the right given to him under the act of November 23, 1921, complainant prays that this honorable court will grant the complainant an injunction, preliminary until final hearing, and perpetual thereafter, enjoining and restraining Harry T. Graham, individually and as collector of internal revenue for the district of Delaware, from distraining or attempting to distrain or collect from complainant or his property the said sum of $1,576,015.86, or any part thereof,
19 as or for income tax for the year 1915; and that this court will enter its decree upon final hearing, declaring that the Commissioner of Internal Revenue has no right, power, or authority in law to require complainant to pay to the collector of internal revenue for the district of Delaware any tax or assessment on account of income received by complainant for the year 1915, and that the court grant such other, further, and general relief as may seem just and equitable; and complainant will ever pray, etc.

(Signed) WM. A. GLASGOW, JR.,
(Signed) HENRY P. BROWN,
(Signed) ROBERT PENINGTON,
Counsel for Complainant.

STATE OF PENNSYLVANIA, COUNTY OF PHILADELPHIA, to wit:

Alfred I. duPont, being duly sworn, deposes and says that he has read the foregoing bill; that he knows the facts therein set forth, and that the same are true to the best of his knowledge and belief.

(Signed) ALFRED I. DUPONT.

Subscribed and sworn to before me, a notary public in and for the county and State aforesaid, this 30th day of January, 1922.

[SEAL.] (Signed) EDITH W. SMELTZER,
Notary Public.

My commission expires the 7th day of March, 1925.

"Exhibit A" to Bill of Complaint.

Statement.

In September, 1915, the stockholders of E. I. duPont de Nemours Powder Company, a New Jersey corporation, caused a reorganization of the business of said company to be made. At that time the company had outstanding the following stocks and bonds:

294,271 shs. com. stock, per $100	$14,166,000—4½% 30-year bonds.
160,686 shs. pfd. stock, per $100	1,230,000—5% mortgage bonds.
454,957	15,396,000

The business had been carried on for a great many years and in September, 1915, had as capital and accumulated surplus employed in the business of manufacturing and selling explosives about $95,000,000. The stockholders, substantially all assenting thereto, organized a new corporation under the laws of Delaware, under the name of E. I. duPont de Nemours & Company, with an authorized capital of $240,000,000 divided into 1,600,000 shares 6% debenture stock and 800,000 shares common stock, both of the par value of $100 each.

All the assets and good will of the old company were transferred as an entirety and a going concern to the new company October 1, 1915, the new company assuming all the liabilities of the old company, except capital stock and funded debt. In return therefore the old company received $1,484,100 in cash to be used in the redemption of its outstanding 5% mortgage bonds, $59,661,700 par value in debenture stock of the new company, of which $30,234,600 were to be used in taking up share for share, and dollar for dollar, the 160,686 shares of the preferred stock of the old company and the 14,166 4½% 30-year bonds then outstanding against said old company, and $58,854,200 par value of the common stock of the new company for immediate distribution among the stockholders of the old company.

The personnel of the stockholders, directors, and officers of the new company on the date of the transfer were the same as that of the old company. Upon receipt by the old company of the cash and

stock aforesaid it distributed to its stockholders two shares of the common stock in the new company for each one share of com-
21 mon stock of the old company held by its stockholders respectively. The old company also proceeded to and has at this date redeemed in cash all its outstanding 5% mortgage bonds, and has by an exchange of debenture stock therefor taken up substantially all of its outstanding preferred stock and all but about $2,000,000 of its 4½% bonds. Since October 1, 1915, it has transacted no business other than that incidental to the redemption of its securities as aforesaid, and is now in process of liquidation.

Under the common-stock distribution aforesaid the undersigned, a stockholder of the old company, received in October, 1915, shares of the common stock of the E. I. duPont de Nemours & Company at par, which stock so received the undersigned contends it is not income, taxable or otherwise, received by him during the year 1915 within the purview of the act of Congress, approved October 3, 1913, and, therefore, the undersigned has not included said stock in his income tax return for said year, and hereby protests against the inclusion of said stock in his income tax return for said year.

Dated _____ Signed _____

Seal of the District Court in Delaware.

Affidavit of Alfred I duPont.

(Filed January 30, 1922.)

Alfred I. duPont, being duly sworn according to law, deposes and says that he is the owner of 75,534 shares of the common stock of the E. I. duPont de Nemours & Company, a corporation which was organized under the laws of the State of Delaware (hereinafter called the Delaware Company).

That on October 1st, 1915, the E. I. duPont de Nemours Powder Company of New Jersey (hereinafter called the New Jersey Company), which was incorporated in 1903, conveyed all of its
22 assets as an "entirety" and "as a going concern" to the Delaware Company. The business of the New Jersey Company was the manufacture of powder and explosives, and this same business had been conducted for over one hundred years in the State of Delaware, and since October 1, 1915, has been conducted by the Delaware Company.

That on September 30th, 1915, and from the date of the organization of the New Jersey Company, he was and has been the owner of 37,767 shares of the common stock of said company, and from the year 1912 all of said shares of stock have stood in his own name on the books of the company.

That in consideration of the transfer of its assets, good will, etc., to the Delaware Company, the New Jersey Company received on October 1, 1915, 596,617 shares of the debenture stock and 588,542 shares of the common stock of the Delaware Company, each share

of debenture and common stock being of the par value of $100, and making a total in par value of $118,515,900, of which stock so received $30,234,600, in par value, of the debenture stock was used in taking up, share for share, and dollar for dollar, the preferred stock and thirty-year bonds of the New Jersey Company, and the remainder of the debenture stock, to wit, $29,427,100, in par value was held in the treasury of the New Jersey Company. The common stock of the Delaware Company of the par value of $58,854,200 was distributed immediately among the common stockholders of the New Jersey Company, each stockholder receiving two shares of the common stock of the Delaware Company for each share of common stock held by him in the New Jersey Company. In this distribution the affiant received on or about October 1, 1915, a total of 75,534 shares of the common stock of the Delaware Company of the par value of $100 per share.

That when this plan of financial reorganization was pro-
23 posed to the stockholders of the New Jersey Company the affiant objected thereto on the grounds, among others, that (1) there was no necessity or occasion for such reorganization, and (2) that the assets proposed to be turned over to the Delaware Company did not in value justify the issue by that company of this stock in the amount of $118,515,900 par value; but the affiant was informed by the treasurer of the New Jersey Company that the latter objection could be met by writing up on the books of the company the value of profits which the company expected to make in the manufacture of powder and explosives under certain contracts with the Allies engaged in the European war, thus making the assets appear on the books equal on October 1, 1915, to the par value of the stock issued by the Delaware Company. The contracts aforesaid were unperformed and on a great number of them deliveries were not to be begun until February, 1916.

That affiant continued, however, to object to such reorganization until the same was approved by two-thirds in amount of the stockholders, and then he acquiesced therein at the personal request of the officers of the company to avoid any appearance of dissension.

The affiant is informed by an examination of the books made by Lyebrand, Ross Bros., and Montgomery, certified public accountants, the value of profits which the company expected to make on the contracts aforesaid was in fact written up on the books of the company on or about October 1, 1915, in the sum of $29,152,116.75, in order to apparently show on the books of the company the assets to be equal in value to the common stock of a total par value of $58,854,200 of the Delaware Company at its par value of $100 per share.

That on March 1, 1916, the affiant, as required by the act of October 3, 1913, made his personal return of total net income accruing to him during the calendar year 1915, and to said return attached
a statement in writing fully setting forth the entire trans-
24 action under which he received the 75,534 shares of common stock of the Delaware Company aforesaid, and protesting

"against the inclusion of said stock in his income tax for said year," 1915. A copy of said statement is attached as Exhibit "A" to the bill filed in the above case.

The affiant is informed and believes that 95% of the stockholders, including all of the large stockholders of the Delaware Company, attached a like statement to their and each of their personal returns of total income for the year 1915, filed on March 1, 1916. Affiant's return aforesaid was duly filed by him with the collector of internal revenue for the district of Delaware on March 1, 1916, and was duly forwarded by said collector, as the law requires, to the Commissioner of Internal Revenue at Washington, District of Columbia.

That on the 30th day of June, 1916, the entire tax for which affiant was liable by reason of net income accruing to him in the calendar year 1915 was due and payable to the collector of internal revenue for the district of Delaware, and on or about said date affiant paid to said collector the entire amount due by him as aforesaid as and for tax upon personal income accruing to him in the year 1915, as shown by the return made by affiant as aforesaid.

That the Bureau of Internal Revenue considered for some time the question of liability to income tax on this stock, and proceeded on several different and inconsistent theories with regard thereto.

The Commissioner of Internal Revenue first took the position that this common stock of the Delaware Company was a stock dividend, and proceeded on that theory and assessed one of the stockholders on the basis that the shares of common stock received by him in the Delaware Company resulted from stock dividend, assessing the same at par, and said stockholder was required to pay the assessment under protest, and he brought suit to recover the amount so paid. That suit is now pending. That after the decision of the Supreme Court of the United States in the case of Towne vs. Eisner, the commissioner abandoned the stock-dividend theory.

That late in the year 1918 or early in 1919 the commissioner proceeded upon the theory that the common stock in the Delaware Company received by the stockholders of the New Jersey Company resulted from a liquidation dividend, and so advised the affiant.

In the letter of J. H. Callan, of the Internal Revenue Bureau, of April 11, 1919, he stated:

"This office holds that the distribution of the stock and securities of E. I. duPont de Nemours & Company was a liquidation dividend. The stockholders of the Powder Company received taxable income to the extent that the fair market value or cost of the stock distributed in each case exceeded the cost to them or the fair market price or value as of March 1, 1913, of their stock in the old corporation in stock to which the distribution was made."

This theory was also conveyed to the stockholders by letter of L. F. Speer, assistant commissioner. This theory was subsequently abandoned.

That about the month of June, 1919, information was received from counsel for the affiant to the effect that the commissioner was considering the distribution of this stock as a property dividend, and contemplated the assessment of the stockholders upon that theory. Whereupon counsel for the affiant interviewed the Commissioner of Internal Revenue and informed him that it was important and desirable that stockholders should know what was the final conclusion of the commissioner, and the commissioner then referred counsel to the advisory board, created under the act of 1918, which provided that—

26 "The commissioner may and on request of any taxpayer directly interested shall submit to the board any question relating to the interpretation or administration of the income, war-profits, or excess-profits tax laws, and the board shall report its findings and recommendations to the commissioner."

That said counsel appeared before the Advisory Board, at Washington, D. C., on June 30, 1919, when the matter was presented by brief and orally.

Nothing was heard from the Tax Advisory Board as to its "findings and recommendations," and on the 28th of October, 1919, said counsel addressed a letter to the Hon. Daniel C. Roper, commissioner, calling his attention to the hearing before the Tax Advisory Board on the preceding June 30, saying:

"I have heard nothing from this hearing, and of course feel exceedingly anxious as it is a matter of very great importance, as the amount suggested as the additional assessment against each stockholder is so large that it would be almost a financial disaster to each of the stockholders to have to raise such a large sum of money to pay out to the Government under protest, with the right to sue for recovery."

and asking whether something could not be done to work out an advantageous basis of settlement.

That no reply was received to this letter and first intimation that the affiant had that the commissioner intended to proceed against him was by a tax bill forwarded January 1, 1920, making a demand for payment of a large sum of money on the basis that the distribution of the common stock of the Delaware Company was a property dividend, and that the fair market value of the stock on October 1, 1915, was $347.50 per share.

27 That this action of the commissioner was more than four years after the transaction, and more than three years and six months after the return of the affiant was made, in which return the commissioner was informed of the circumstances under which the stock was delivered to him.

That the affiant has been informed by the Commissioner of Internal Revenue that the stock has been valued for the purpose of the income tax due by the affiant at $347.50 per share.

That the situation presented to the commissioner and upon which the said value was determined was that the Delaware Company had

issued to the New Jersey Company 588,542 shares of its common stock of the par value of $100 per share, and the New Jersey Company had distibuted this stock to its stockholders, and, therefore, the question was, What was the fair value of this 588,542 shares of common stock so distributed? It was not a question of what 10, 20, 50, 100, or 1,000 shares were worth, but the real question was the value of the entire issue of stock. The question, so far as the affiant was concerned, was the value per share of the 75,000 shares received by him. The commissioner, however, based the finding of the value of the shares entirely upon the private sale of comparatively small lots of stock at Wilmington, the home of the company. The stock was not listed on any exchange, or curb market, and the only sales made were between individuals or brokers, and these sales comprised in the total a small number of shares compared with the total number of shares distributed.

In the case of United States vs. Phellis, in the Court of Claims, in which the plaintiff, for reasons hereinafter set forth, admitted that the value of the stock "was $347.50 a share at the time of its receipt by claimant in October, 1915," the only evidence in support of
28 this admission was the private sale of 183 shares on October 1, 1915, as follows:

Date.	Buyer.	Rate.	Number.
Oct. 1	F. S. Homan	349	10
1	Louise H. Tatnall	353	2
1	Robert E. Cullen	355	5
1	George P. Bissell	353	25
1	Wheatley Matchett	351½	50
1	Tilgh Johnston & Son	353	2
1	Tilgh Johnston & Son	353	15
1	Ernest Smith	355	20
1	Wm. R. Chamberlin	358	4
1	Wm. M. Francis	357	50
	Total		183

The affiant has no way of telling exactly what number of shares of the Delaware Company were sold immediately after this reorganization, but it is a fact that very few shares were sold compared to the total number of shares received by the stockholders.

That the case of Phellis vs. United States was brought in the Court of Claims to recover the amount paid by the claimant under protest on a valuation of his 500 shares at $347.50 per share, and the claimant admitted that the fair value of each share was $347.50, and the evidence in support of this admission is set forth above showing the sale of 183 shares.

That counsel for the affiant, as representing the stockholders who were not parties to the suit, got into correspondence with counsel for the complainant, and insisted that the fair value of the common

stock of the Delaware Company on the 1st of October, 1915,
29 was not equal to its par value, and wrote to counsel for Phellis, under date of February 21, 1921, as follows:

F. S. Bright, Esq.,
Colorado Building, Washington, D. C.

My Dear Mr. Bright: In the assessment of the income tax against the stockholders of the duPont Company, the Government took the value of each share of stock to be $347.50, and this was based upon the fact that some of the stock sold in the market immediately after October 1, 1915, at about that figure.

Of course, everybody knows that no large blocks of the stock could have been sold in the market at any such price. In fact, I think a thousand shares would have broken the market at any time. Small lots could probably have been worked off at that figure.

In the case of Eisner vs. Macomber, 252 U. S. 189, at p. 215, the court speaks of the value of stock as shown by market prices and said:

"But we regard the market prices of the securities as an unsafe criterion in an inquiry such as the present," etc.

In Eisner's Estate, 178 Pa. 143, at p. 147, the court said:

"Market values are no criterion."

The fact is that recently, as I informed, some of this stock has sold down as low as $150.00 per share.

Don't you think it would be very desirable to get into the record in some way the basis upon which the Government made the valuation, to wit, market value alone, so that if the tax should by any possibility be sustained the valuation might be reduced?

30 I have in my possession a balance sheet of the E. I. duPont de Nemours Powder Company of September 30, 1915, the day the transfer took place, and it shows the excess of assets over liabilities, $75,451,883.25.

Capital & surplus—Pref. stk	$16,068,801.34
Com. stk	29,427,282.55
Profit & loss	29,955,799.36
	$75,451,883.25

On the basis of the book value the Powder Company stock could not have been worth more than $200 per share at that time, and the value by the books of the Delaware Company stock could not have been over $100.00 per share. The sale value was a purely speculative one, based upon anticipated profits which were realized, and upon which the stockholders when they were declared in dividends, paid a tax. It therefore seems to me quite an important matter to our clients that in some way we should get this before the Court of Claims, so that that court might review the question of the value of the stock for taxation purposes, if it should hold that the stockholder was taxable under the law.

I merely make this suggestion to you, and I am inclined to think it is worth careful consideration. Perhaps you could get a stipula-

tion with counsel as to the basis upon which the Government made the tax to be put into the record, also a stipulation as to the last market price of the stock.

I now expect to be in Washington on Wednesday and will call to see you.

Very truly,

(Signed) WM. A. GLASGOW, JR.

That again, on February 22, a supplemental letter was written by counsel for the appellant to counsel for Phellis, insisting upon raising the question of the value of the stock, as of October 1st, 1915, as follows:

31

F. S. BRIGHT, ESQ.,
Colorado Building, Washington, D. C.

MY DEAR MR. BRIGHT: Supplementing my letter to you of yesterday upon the question of value of the stock of the Delaware Company when it was received by the stockholders of the Powder Company.

On the 23rd of December, 1914, less than a year before the transfer of the stock (September 30, 1915), Mr. T. Coleman duPont offered to sell to the Powder Company 20,000 shares of the common stock of the company at $160.00 per share. The finance committee met and considered the matter, and passed a resolution on that day "That we do not feel justified in paying more than $125.00 per share for this stock," as the members of the committee said "at that time."

Subsequently, in March, 1915, Mr. T. Coleman duPont sold his entire holdings of preferred and common stock in the Powder Company of New Jersey to the duPont Securities Company. The price for the preferred stock was $85.00 per share and for the common stock $200.00 per share, so that it will be seen that the only sale in 1915 of common stock of the Powder Company in any considerable quantity was at $200.00 per share, and the balance sheet of the company as suggested in my letter yesterday showed that the book value of the common stock of the New Jersey Company on the 30th of September, 1915, was not in excess of $200.00 per share. Undoubtedly, the high value at which the stock sold was a speculative value, based upon expected contracts and profits thereafter to be realized, and I do not think any considerable amount of the stock could have been sold at prices much above $200 per share.

32

These profits were realized and tax thereon paid, as distribution occurred.

Based upon a price of $200 per share, when it is considered that the Powder Company retained in its possession something over 29,000 shares of debenture stock of the Delaware Company, the two shares of the Delaware Company represented in assets exactly what the one share in the Powder Company represented on September 30, 1915. Therefore, the Delaware Company's stock was certainly not worth more than $100.00 per share, based upon book value, and was

worth less than that when the holding of the New Jersey Company in debenture stock is taken into consideration.

It occurs to me that we should protect our clients in this regard by having the facts as to the real book value of their stock in the Delaware Company when received set forth. It will make an enormous difference in taxation to them if on any ground the court should sustain the right of the Government to the tax.

I am suggesting this to you for your consideration, as I expect to have the pleasure of calling on you to-morrow or next day, when we can discuss it.

Very truly,

(Signed) WM. A. GLASGOW, JR.

That under date of February 24 counsel for the affiant received a letter from the general counsel of the company, to whom the matter had been submitted by Mr. Bright and to whom a draft of his brief, which he desired to file as amicus curiæ, had been submitted, as follows:

33 Mr. WM. A. GLASGOW, JR.,
1018 Real Estate Trust Bldg., Philadelphia, Pa.

MY DEAR MR. GLASGOW: I received a copy of your brief amicus curiæ in the Phellis case, which I have read with much interest. Your presentation of the question is, in my opinion, very strong in support of complainant's contention, and accords with my own views in the matter. I have no doubt your brief will be of great benefit to all stockholders similarly interested and of great assistance to the court.

With respect to your tentative suggestion that we make the further contention that in the event the court finds this distribution to be taxable that the book value of the stock be taken as the basis of taxation and not the market value, as the Government contends, I have given consideration to this and I desire to confirm my first impressions that it would not be to our interests as a question of policy to make this claim in this suit. The issue under the record as it now stands is wholly as to the taxability of this stock distribution and not as to the excessiveness of the tax. I do not feel it would be wise to prejudice in any manner, however slight, the issue as to nontaxibility by bringing in the issue as to the excessiveness of the assessment. Furthermore, after consulting with a number of our larger stockholders here, they are inclined to the view that we could not succeed in establishing that the money value of the stock was less than $347.50. While the market value of a stock is an unsafe criterion, the same can be said of the book value of stock in many instances. To illustrate, the market value of du Pont common to-day is nearly 100% less than the book value. Again, many interested stockholders prefer, if they are legally required to pay any tax on this distribution, to pay on the basis of $347.50 and
34 obtain the advantage of having this stock on their books at this rate.

Quite aside from the above, Mr. Bright calls my attention to the fact that if we should make this contention in the present case and succeed that it would preclude us from appealing the Phellis case to the Supreme Court of the United States, this because the jurisdiction of the Supreme Court is confined to cases involving over $5,000. The tax in the Phellis case is $5,625.00.

Very truly yours,

(Signed) J. P. LAFFEY.

After receiving this letter from Mr. J. P. Laffey, declining to permit the question of the value of the stock to be raised in the case, counsel for the affiant filed a brief in the Court of Claims as amicus curiæ, in which he put the following note:

"While some few shares of the New Jersey Company sold for $795 per share and of the Delaware Company sold for $347.50 per share, no considerable part of the stock could have been sold at such figures, and this was the only evidence of valuation for assessment by the Government and was an 'unsafe criterion.' Eisner vs. Macomber, 252 U. S. at p. 215."

And again, when the case was in the Supreme Court, counsel for affiant prepared a brief which was filed for the appellee, which had the following note:

"While some few shares of the New Jersey Company stock sold in the market for $795.00 per share, and the Delaware Company stock for $347.50 per share, no considerable part of this stock could have been sold at such figures, and this was the only evidence of valuation used by the Government in the assessment and was an 'unsafe criterion.' Eisner vs. Macomber, 252 U. S. at p. 215.

35 The book value of the stock was entirely disregarded, and this showed the Delaware Company stock worth not more than par. If the assessment had been based upon par, as was attempted in Towne vs. Eisner, the plaintiff would have been charged with income of only $50,000 instead of being charged with income of $173,750.00 as he is."

That counsel for the affiant has protested at every opportunity that the common stock of the Delaware Company was not worth in excess of par on October 1, 1915, and for the reason the question was not raised and judicially passed upon in the Phellis case, fixing the value of the stock, was that counsel for Phellis objected "as a question of policy" to making the claim as to valuation in that case, and further because—

"Again, many interested stockholders prefer, if they are legally required to pay any tax on this distribution, to pay on the basis of $347.50, and obtain the advantage of having the stock on their books at this rate."

That while it may be to the advantage of some stockholders to have the Government charge them on the basis of $347.50 per share at the 1915 rate and have the stock on their books at that value for the purposes of credit at higher rates of taxation, the affiant, who

has never sold any of his stock but has held it just as it was issued to him, will be mulcted to the point of disaster by an artificial valuation.

That in the case of United States vc. Phellis, in the Supreme Court of the United States, Mr. Justice Pitney, delivering the opinion of the court, said:

"The common stock of the new company after its transfer to the old company and prior to its distribution constituted assets of the old company which it now held to represent its surplus of
36 accumulated profits—still, however, a common fund in which the individual stockholders of the old company had no separate interest. But when this common stock was distributed among the common-stock holders of the old company as a dividend, then at once—unless the two companies must be regarded as substantially identical—the individual stockholders of the old company, including claimant, received assets of exchangeable and actual value severed from their capital interests in the old company proceeding from it as the result of a division of former corporate profits, and drawn by them severally for their individual and separate use and benefit. Such a gain resulting from their ownership of stock in the old company and proceeding from it constituted individual income in the common sense."

That it would therefore seem that the court held that the common stock of the Delaware Company represented the "surplus of accumulated profits" of the New Jersey Company, and that the distribution of this stock among the stockholders resulted in a "division of former corporate profits," and therefore the conclusion would seem to be inevitable that the value of this stock must be measured by the "former corporate profits," and the "surplus of accumulated profits," and this would seem to be the rule which the Supreme Court recognized as showing that the common stock was income or profit, and also the basis upon which its value is to be ascertained.

That the former profits accumulated on September 30, 1915, which are to be taken as the basis of the distribution of this stock was income or profit must be the profits accumulated after the 1st of March, 1913, up to the 1st of October, 1915.

That it will appear from the balance sheet of the New Jersey Company as of March 1, 1913, that the company had accumu-
37 lated profits as of that date of $3,327,893.51. All dividends paid after this date were concurrently earned.

That it is also shown by the balance sheet of the company of September 30, 1915, that the profit and loss account (showing its accumulated profits) was $29,955,799.36, and that on the basis of the accumulated profits up to September 30, 1915, deducting the accumulated surplus profits on March 1, 1913, the stock of the New Jersey Company book value was less than $200 per share, and if when the assets of the New Jersey Company were turned over to the Delaware Company on October 1, 1915, the common stock of the Delaware Company represented "the surplus of accumulated profits"

and the " former corporate profits," the value of the Delaware Company common stock based upon such accumulated profits was less than $50.00 per share.

That the stock issued by the Delaware Company to the New Jersey Company for its assets as an " entirety " and as a " going concern " amounted to $118,515,900.00.

Debenture stock retained by the New Jersey Company	$29,427,100	
Debenture stock used to pay 4½% 30-year bonds of New Jersey Company	14,166,000	
Debenture stock used to retire preferred stock New Jersey Company	16,068,600	
		59,661,700.00
		$58,854,200.00
Common stock Delaware Co. issued to stockholders of New Jersey Company		$58,854,200.00

38 That under the decision of the Supreme Court in the Phellis case the stock of the New Jersey Company held by the stockholders represented capital, and it was further held by that court that this capital or par value of $100 per share was unimpaired because the New Jersey Company retained an equal number of shares of debenture stock of the Delaware Company of the par value of $100. Wherefore, the court held that the common stock of the Delaware Company, amounting to 588,542 shares of the par value of $100 per share, or a total stock issue of $58,854,200, represented, while held by the New Jersey Company, " its surplus of accumulated profits," and after this common stock was distributed to the stockholders of the New Jersey Company it was " severed from the capital interests in the old company proceeding from it as the result of a division of former corporate profits and drawn by them severally for their individual and separate use and benefit." Therefore, in order to determine the value per share of the common stock of the Delaware Company received by the stockholders of the New Jersey Company, it is necessary to ascertain as of October 1, 1915, the " surplus of accumulated profits " and the " former corporate profits " of the New Jersey Company.

That in making the assessment of the common stock of the Delaware Company as of October 1, 1915, the Government did not consider the " surplus of accumulated profits " or the " former corporate profits " of the New Jersey Company, but ascertained at Wilmington, Delaware, what sales had been made privately between brokers or others, of comparatively few shares of stock, and having been informed that the stock had sold privately at $347.50 or higher (in small lots) the Government assessed the value of the stock on that evidence alone at $347.50.

That the question was not the value of comparatively small blocks of the stock but the value of 586,542 shares. Because A may have sold 10, 20, or 50 shares of the stock privately, under certain circumstances, at $347.50 is no evidence that the 75,000 shares of the affiant could have been sold at any such figure, and the Government entirely disregarded the view of the Supreme Court as to the stock representing the "surplus of accumulated profits" and the "former corporate profits."

That from the year 1904 the New Jersey Company had in effect by proper corporate action a bonus or profit-sharing plan, which provided for the distribution among its employees who might contribute to the general good of the company, and whom it was desired to have interested as stockholders therein, a part of the earnings of the company. This distribution, however, while ascertained and awarded to the employee in terms of dollars, based upon a percentage of surplus earnings of the company, was paid to the employee in the capital stock of the company at the value at which it was purchased by the company. For example, if the officers of the company awarded to an employee $1,000, they paid this in shares of stock of the company at the price at which it was purchased, and if the shares cost the company $250.00 per share the employee received four shares. The stock, however, was not immediately delivered to the employee, but if he remained with the company for five years, at the end of that time the stock was delivered to him full paid and nonassessable.

The stock for bonus distribution was purchased by the company monthly, and during the period prior to the 1st of October, 1915, a large amount of the stock of the New Jersey Company had been purchased by the officers of the company for the bonus distribution. These purchases were made by the officers of the company at high prices and it was to the interest of the officers to bid the stock to a high price. After October 1st, these high prices of New Jersey Company stock were reflected in the price of Delaware Company stock. Immediately after the 1st of October, 1915, a large amount of stock in the total was purchased from day to day in small-share lots for this bonus distribution at high prices. Between the 1st of October, 1915, and the 1st of January, 1916, the company purchased for bonus purposes 4,586 shares of the common stock of the Delaware Company, and between the 1st of October, 1915, and the 1st of April, 1917, about a year and six months, the company purchased for bonus purposes 29,006 shares of its common stock at the average price of $305.83 per share, and 16,640 shares of its debenture stock at the average price of $105.65 per share.

It cost the company nothing more to pay a high price for its own stock than to pay a low price therefor. It had so many dollars—being a certain percentage of its profits—to invest in its own stock for bonus distribution, and it was a matter of no financial concern to the company, its stockholders, or officers, what price they paid for the stock.

This purchase by the officers of the company of small lots offered, with unlimited authority as to the price, furnished the backbone of the demand for the stock, and without this purchase by the company from month to month any substantial amount of the stock put upon the market would have had no purchaser as a whole, and if it had been attempted to sell the stock in small lots, a large block of, say, 10,000 shares would undoubtedly have broken the market down to par.

The officers of the company who were managing the bonus plan—the purchase of the stock and its distribution—were deeply interested in maintaining this stock at a high price. This is shown by the fact that these officers of the company, constituting practically a majority of the board of directors through the duPont Securities Company had borrowed in New York from J. P. Morgan & Company ten million of dollars, for which a large part of their common stock, if not all, in the Delaware Company was put up as collateral, and it was of the greatest importance to the officers of the company who were controlling the purchase of the stock of the company for bonus purposes to see that this stock was kept up at an
41 apparently high price, thereby strengthening their collateral in New York for the large loan aforesaid.

The only evidence of actual sales showing the price and number of shares sold must be secured if at all from the books of brokers who were privately dealing in this stock. There were no public sales: the stock was not listed on any exchange, and the question of sale, was one of private negotiation between individuals.

The only evidence of sales—the price and the number of shares—is contained in Exhibit No. 11 in the Phellis case, showing the sale in small lots of a total of 183 shares.

Therefore, if the true guide in this case as to value should be the sales made of the stock—and this the affiant denies under the opinion of the Supreme Court in the Phellis case—yet the evidence of sales, the number of shares sold, and the circumstances surrounding the sales are such that the sales price of the stock furnishes no proper criterion as to the real value thereof.

On the 24th of January, 1920, affiant was informed in a letter from the Acting Assistant to the Commissioner of Internal Revenue that the commissioner claimed that he was liable for the additional tax in the sum of $1,576,015.86, and demanding payment thereof.

Affiant charges that no return has been made for him by the commissioner in accordance with the terms of the act of October 3, 1913. The notice and demand dated December 31, 1919, aforesaid, was made upon him charging that he had received on the 1st of October, 1915, 75,534 shares of the common stock of the Delaware Company in accordance with the circumstances above set forth, and further, that said stock on that day was of the fair value of $347.50 per share, and that therefore affiant had received $26,248,065 of personal in-
42 come in the year 1915 in addition to the income shown upon the return filed by affiant as aforesaid. Affiant claims that the

commissioner had no power in law to make the notice and demand upon affiant for the payment of the additional tax aforesaid, and that the commissioner acted without warrant of law for the following reason, to wit:

1. The commissioner at no time made a return upon information for affiant as to additional income received by him in the year 1915.

2. That under the act of October 3, 1913, and the law, no assessment for additional income tax could be made by the Commissioner of Internal Revenue until he had made "a return upon information" for affiant.

3. That the notice and demand dated December 31, 1919, was made upon affiant more than three years after the commissioner was informed and discovered that affiant had received the 75,534 shares of the common stock of the Delaware Company as aforesaid.

4. That said notice and demand dated December 31, 1919, was made more than three years after the 1st of March, 1916, at which date affiant's return of income accruing to him for the year 1915 was "due" and actually filed by affiant.

Therefore, affiant claims that in making the demand upon him for the sum of $1,576,015.86 as additional income tax for the year 1915, the Commissioner of Internal Revenue acted unlawfully, illegally, and without warrant of law.

Affiant was further informed by the letter dated January 24, 1920, from the Acting Assistant to the Commissioner of Internal Revenue that the commissioner renewed his demand for the payment of the $1,576,015.86 by affiant as additional income tax, and informed affiant that unless he paid the same, collection would be made
43 thereof by the collector for the district of Delaware "through distraint"; and thereupon affiant filed a claim in abatement of said tax, which said claim was duly referred to the Commissioner of Internal Revenue and has been overruled by him.

That on November 23, 1921, Congress passed an act known as "the revenue act of 1921." By said act, section 250-d, it is provided as to demands for taxes made under that act "for prior taxable years or under any prior income excess-profits or war-profits tax acts" or under section 38 of the act approved August 5, 1909, that—

"No suit or proceeding for the collection of any such taxes due under this act or under any prior income excess-profits or war-profits tax acts or of any taxes due under section 38 of such act of August 5, 1909, shall be begun after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this act."

No "suit or proceeding" has been "begun" against affiant for the collection of any additional income tax for the year 1915, and he has not consented in writing or otherwise to any "determination, assessment, and collection" of any additional income tax upon him for the year 1915. Affiant therefore claims that any claim of additional income tax for the year 1915 is under the provision of the

act aforesaid of November 23, 1921, barred after five years from the 1st day of March, 1916, the day upon which his return for 1915 was filed, and that no "suit or proceeding" can be begun against him for the collection thereof after the 1st day of March, 1921.

Affiant further shows that by section 1320 of the act known as "the revenue act of 1921," approved November 23, 1921, it is provided:

44 "That no suit or proceeding for the collection of any internal revenue tax shall be begun after the expiration of five years from the time such tax was due except in the case of fraud with intent to evade tax or willful attempt in any manner to defeat or evade tax. This section shall not apply to suits or proceedings for the collection of taxes under section 250 of this act, nor to suits or proceedings begun at the time of the passage of this act."

Affiant further claims that any tax for which he was liable on account of net income accruing to him for the year 1915 was due and payable "on or before the 1st day of June," 1916, and that he has not been guilty of "fraud with intent to evade tax" nor has he been guilty of "willful attempt in any manner to defeat or evade tax"; and that no "suits or proceedings" were "begun" against him for the collection of any additional income tax for the year 1915 at the time of the passage of "the revenue act of 1921," approved November 23, 1921; and, therefore, he claims that any "suit or proceeding" by the Commissioner of Internal Revenue or the collector of internal revenue for the district of Delaware against him for additional income tax for the year 1915 is forever barred by the provisions aforesaid of the act of 1921.

That the collector of internal revenue for the district of Delaware intends to proceed by distraint or otherwise to collect from affiant the $1,576,015.86, referred to in the notice and demand of December 31, 1919, and that the said collector will proceed to collect the same by distress and sale of affiant's lands and freehold in the district of Delaware, and that said demand on the part of the Commissioner of Internal Revenue constitutes a cloud upon the lands and freehold of affiant situate in Brandywine Hundred, New Castle County, Delaware; and that if the commissioner proceeds to collect said demand by distress and sale of affiant's lands and freehold that the loss of his said freehold by means of a tax sale would be irreparable damage to affiant. That by reason of the long delay on the
45 part of the Commissioner of Internal Revenue, the 75,534 shares of common stock of the Delaware Company received by affiant on October 1, 1915, and now held by affiant are not salable, that no market can at present be found for said stock, and that affiant will be unable by the use of said stock to secure the money to prevent the sale of his freehold estate upon such distraint.

That the act of 1921 and the sections above quoted forever bar the collector of internal revenue from proceeding by distraint to collect the $1,576,015.86, or any part thereof, claimed by said Commissioner of Internal Revenue, but if the said collector should collect said tax

by unlawful distraint upon affiant's property in violation of his duty, and in violation of the act of November 23, 1921, aforesaid, affiant's right to recover in a suit at law the said amount unlawfully collected and distrained as aforesaid by the said collector is so doubtful that affiant would be irreperably injured and damaged by permitting the distraint upon his property as aforesaid.

Section 3225 of Revised Statutes, as amended by the "revenue act of 1921," is as follows:

"When a second assessment is made in case of any list, statement, or return which in the opinion of the collector or deputy collector was false or fraudulent, or contained any understatement or undervaluation, such assessment shall not be remitted, nor shall taxes collected under such assessment be refunded or paid back or recovered by any suit unless it is proved that such list, statement, or return was not wilfully false or fraudulent, and did not contain any wilful understatement or undervaluation."

That this same amendment of section 3225 was in the "revenue law of 1918."

That, therefore, if by distraint upon affiant's property the collector should collect the additional tax claimed by him for the year
46 1915, by sale of affiant's property, or if affiant should pay the same under duress and under protest, affiant would be deprived of the right given him by the act of November 23, 1921, and he would be barred from recovering the money collected by the collector, as aforesaid, in case it should be held that the return made by affiant on March 1, 1916, was "wilfully" incorrect and in that sense "wilfully" false, and would further be deprived of the right given him by the act of November 23, 1921, if it should be held that affiant's return was wilfully incorrect and that it contained wilful understatement of income, in that the Supreme Court in the case of United States vs. Phellis has held that the common stock received by the affiant on October 1, 1915, was taxable under the act of October 3, 1913, and, therefore, under this decision of the Supreme Court affiant's return made on March 1, 1916, was incorrect in not including said common stock.

That the act of November 23, 1921, gives to the affiant the right to hold his property free of any suit or proceeding by the said collector by levy upon and sale of the same for income tax claimed against affiant for the year 1915, and if the collector can proceed by distraint to collect the same affiant is irreparably deprived of the forum in which to assert his right under the said act of 1921, or to recover the tax collected by the collector in violation of the act of November 23, 1921.

That the 75,534 shares of common stock of the Delaware Company received by him on the 1st day of October, 1915, was not of a fair value in excess of $50.00 per share, and yet the collector of internal revenue has charged affiant with the value therof as of October 1, 1915, at $347.50 per share.

That the return required of affiant by the act of October 3, 1913, of net income accruing to him in the year 1915 was due on March 1, 1916, and affiant on that day made his return as required by law.

47 That by section 3226 of the Revised Statutes as amended by section 1318 of the "revenue act of 1921," it is provided that—

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or for credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, or the regulations of the Secretary of the Treasury established in pursuance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim, unless the commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum."

That by section 252 of the revenue act of 1918 it is provided—

"That if upon examination of any return of income made pursuant to * * * the act of October 3, 1913, * * * it appears that an amount of income * * * tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income * * * taxes or installments thereof then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer. Provided, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer."

48 That the above section 252 of the act of 1918 was reenacted as section 252 of the "revenue act of 1921."

That if the collector of internal revenue for the district of Delaware is now permitted to collect the $1,576,015.86 as and for additional income tax against affiant for the year 1915, that affiant by the delay of the Commissioner of Internal Revenue in assessing and collecting such tax, the amount whereof is in excess of that properly due, is not permitted under the provisions of law above set forth to file with the commissioner a claim for refund of the excess amount of said tax properly due, in that more than five years since the date "when the return was due" by affiant on March 1, 1916, have elapsed; and by the delay of the commissioner affiant will be deprived of any remedy for the collection and return of the excess taxes collected from affiant for the year 1915.

That while the law gives affiant a right of action to recover taxes erroneously or illegally assessed or collected provided he proceeds

within the proper time by claim for refund thereof, yet the revenue act of 1921 does not give to the affiant a right of action to recover taxes which are collected by distraint or otherwise by the collector of internal revenue in violation of the limitations provided by the revenue act of 1921; and if the collector of internal revenue for the district of Delaware should proceed in violation of the revenue act of 1921, and collect the income tax for the year 1915 against affiant by the sale of his property or otherwise, it is very doubtful whether affiant would have a right of action against the collector to recover the amount so collected, on the ground that the collector has proceeded in violation of the limitations contained in the "revenue act of 1921."

That while section 3224 of the Revised Statutes of the United States provides that—

49 "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court,"

that the provision of this section must be read in the light of the subsequent act of Congress of November 23, 1921, which forever bars the Commissioner of Internal Revenue from "the assessment or collection of any tax" against affiant for income received by him in the year 1915, and Congress has modified to this extent section 3224 of the Revised Statutes, and affiant is entitled to the full benefit of his right given by that act, and to prevent in a court of equity the distraint upon his property by the collector of internal revenue for the district of Delaware for the collection of the tax against him for the year 1915.

By the act of Congress of November 23, 1921, it was provided that "no suit or proceeding shall be begun" to collect the claim of the Commissioner of Internal Revenue against affiant for additional income tax for the year 1915, and this is a right given to affiant to hold his property free from distraint by the collector for the collection of said claim.

That affiant is now threatened immediately with such distraint, and he has no other remedy to enforce his said right except in this court of equity, and without the aid of this court on the bill filed by affiant, he will be forever deprived of the right given him by the act of Congress aforesaid and immediate and irreparable loss and damage will result to the affiant before the matter can be heard on notice.

Wherefore affiant requests that this court issue its temporary injunction enjoining and restraining the defendant above named, his agents, servants, employees, and subordinates, and each and every of them from in any manner enforcing or collecting or attempting to enforce or collect or causing to be enforced or collected against

50 the plaintiff, the tax or any part thereof claimed by the Commissioner of Internal Revenue against the income received by the affiant during the year 1915, until the further order of this court or the final determination of this suit.

That no previous application for this temporary injunction has been made.

(Signed) ALFRED I. DUPONT.

Sworn to and subscribed before me this 30th day of January, 1922.

[SEAL.] (Sgd.) EDITH W. SMELTZER,
Notary Public.

My commission expires March 7, 1925.

In United States District Court.

Motion for preliminary injunction.

(Filed January 31, 1922.)

And now, to wit, this 31st day of January, A. D. 1922, the complainant in the above cause, by Wm. A. Glasgow, jr., Henry P. Brown, and Robert Penington, esquires, his solicitors, moves the court that a preliminary injunction issue out of this court and be served upon the said defendant, as prayed in the bill of complaint filed in said cause.

(Sgd.) WM. A. GLASGOW, JR.,
(Sgd.) HENRY P. BROWN,
(Sgd.) ROBERT PENINGTON,
Solicitors for Complainant.

In United States District Court.

Order setting motion down for hearing.

(Filed January 31, 1922.)

And now, to wit, this 31st day of January, A. D. 1922, the bill of complaint filed in this cause having been read and considered
51 by the court, together with the motion this day filed in said cause by the complainant, through his solicitors, for a preliminary injunction as prayed in said bill of complaint:

It is ordered by the court that said motion for a preliminary injunction be heard in this court in Wilmington, in said district, on Tuesday, the 14th day of February, A. D. 1922, at 10 o'clock in the forenoon:

And the complainant in this cause having filed in this court with his bill, the affidavit and exhibits in support of said motion, it is ordered:

That the defendant, after being served with a copy of this order, and the bill, exhibits, and affidavits aforesaid, file in this court, on or before the 8th day of February, A. D. 1922, all affidavits and exhibits in opposition to said motion:

And further, that the complainant file in this court on or before the 11th day of February, A. D. 1922, all affidavits and exhibits in reply to such new matter as may be set forth in any affidavit or exhibit filed as aforesaid by said defendant;

And it is further ordered by the court, that notice of said motion, with this order, be forthwith given to the defendant, and to that end the United States marshal for this district do forthwith serve upon the defendant a copy of said motion and this order, together with a copy of the bill of complaint filed in this cause.

(Sgd.) J. W. THOMPSON, J.

In United States District Court.

Motion to dismiss.

(Filed February 14, 1922.)

And now comes Harry T. Graham, defendant in the above cause, by James H. Hughes, jr., U. S. attorney for the district of Delaware, his attorney, and moves the court to dismiss the bill of com-
52 plaint filed herein for the reasons and upon the grounds that, as appears upon the face thereof:

1. This court has no jurisdiction to hear and determine this suit, such jurisdiction being specifically denied it by section 3224 of the Revised Statutes of the United States.

2. The plaintiff has a plain, speedy, and adequate remedy at law.

3. This court has no jurisdiction of the subject matter of the suit.

4. The said complaint is wholly without equity.

5. The plaintiff is not entitled to the relief prayed for by this complaint against the defendant, nor to any relief arising from the facts alleged in said complaint.

6. The said bill of complaint is argumentative and states mere legal conclusions, particularly in paragraphs numbered twelve, thirteen, fourteen, seventeen, eighteen, and twenty-one.

7. There is a misjoiner of parties in said bill in this—

That Harry T. Graham, individually, is without power and means to collect the taxes complained of and has no interest, individually, in the subject matter of the suit.

8. The bill of complaint is not verified according to law.

Wherefore, and for divers other good reasons of objection, the defendant prays the judgment of this honorable court whether he shall be compelled to make further or any answer to the said complaint and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

(Sgd.) JAMES H. HUGHES, JR.,
U. S. Atty. Dist. of Del.

53 In United States District Court.

Affidavit of defendant, Harry T. Graham.

(Filed February 14, 1922.)

Harry T. Graham, being duly sworn according to law, deposes and says that he is collector of United States internal revenue for the district of Delaware, and the defendant in this cause of action.

That on February 19, 1916, Alfred I. duPont, hereinafter referred to as the complainant, filed a return of income tax on Form 1040 (revised) for income received by him as an individual during the year ended December 31, 1915 (Exhibit 1); that said income tax return contained no report of the receipt by the complainant during the year 1915 of 75,534 shares or any other number of shares of the common stock of E. I. du Pont de Nemours & Co. of Delaware, hereinafter called the Delaware Corporation, and no enclosure, exhibit, or statement setting forth any of the details or circumstances showing the receipt by him as dividends, income, or otherwise, of 75,534 or other number of shares of common stock of the Delaware Corporation, nor has complainant ever filed with affiant any such return, statement, or exhibit showing the receipt by him of any such shares of common stock.

Affiant is informed and believes that on February 24, 1916, complainant addressed a letter (Exhibit 2) to the collector of internal revenue at Baltimore, Maryland, in which he stated that he had, through error, overstated the amount of his net income and that the same should be reduced in the amount of $137,925.60, and that the amount of tax shown on said return as due and payable should be reduced in the amount of $8,275.54, and requesting that said return be returned to him with a new blank in order that he might correct said errors; that on February 25, 1916, the collector at Baltimore informed complainant by letter (Exhibit 3) that he was hold-
54 ing complainant's original income tax return in order that complainant might submit an amended return. On March 4, 1916, complainant filed with the collector at Baltimore an amended return of income received during the year ended December 31, 1915, on Form 1040 (revised) (Exhibit 4), which said income tax return, as amended, contained no report of the receipt by the defendant of 75,534 shares or any other number of shares of the common stock of the Delaware Corporation, and no enclosure, exhibit, or statement setting forth any of the details or circumstances showing the receipt by him as dividends, income, or otherwise, of 75,534 or other number of shares of common stock of the Delaware Corporation, nor has complainant ever filed any such return or statement or exhibit showing the receipt by him of any such shares of common stock.

Affiant is informed and believes, from an examination of the records of the Bureau of Internal Revenue, that on November 27, 1917, Income Tax Inspector D. P. du Ross made a report to the revenue agent in charge at Baltimore (Exhibit 5) showing the result of an

investigation made by him of the complainant's tax liability for the years 1913, 1914, and 1915, and in said report said inspector reported among other things that the complainant had received as income during the year 1915 "200% common stock dividends issued by E. I. du Pont de Nemours Co. previously omitted," and that as a result of such investigation and other investigations the Commissioner of Internal Revenue, in the regular routine of office procedure, prepared a return upon information as provided for by sec. 2E of the income tax act of Oct. 3, 1913 (Exhibit 6); and that said return of Income Tax Inspector du Ross contained the first information to the Commissioner of Internal Revenue that complainant had received during the year 1915, as dividends, said shares of common stock of the Delaware Corporation. Affiant is informed and believes that on January 22, 1918, Mr. William A. Glasgow, jr., as attorney for the complainant "and several others" addressed a letter
55 (Exhibit 7) to L. F. Speer, Deputy Commissioner of Internal Revenue, Washington, D. C., in tenor as follows:

"Referring to the question of income tax on the issue of securities of the E. I. duPont de Nemours & Company in 1915, which has been the subject of investigation, and about which I have heretofore written you.

"I represent Mr. Alfred I. duPont, a stockholder at Wilmington, Delaware, and several others, and before any attempt is made to assess any stockholder, I think it very important that the commissioner should give us a hearing, especially in view of the case of Towne v. Eisner, decided by the Supreme Court of the United States on January 7th, and the principles of which I contend govern under the facts of the matter. I therefore earnestly ask that before anything is done, a hearing should be had.

"Suggestion was made to me as to preparing a brief of the facts. Representing Mr. Alfred I. duPont, I have no free access to the books of the duPont Company, and I have been trying to get the information upon which to prepare this accurate statement of facts. I have been unable to do so up to the present time, but will hope to do this in the near future."

That in response to the foregoing request the Commissioner of Internal Revenue granted a hearing to be held at 10.30 a. m., Tuesday, April 2, 1918, in the Treasury Building at Washington, D. C.

Affiant is further informed and believes that on March 26, 1918, Mr. Glasgow wrote a letter (Exhibit 8) to L. F. Speer, Deputy Commissioner of Internal Revenue, requesting a postponement of the hearing on the income tax liability of Alfred I. duPont until May 15, 1918; and that the Deputy Commissioner of Internal
56 Revenue replied on April 1, 1918 (Exhibit 9) informing Mr. Glasgow that the question of Mr. duPont's tax liability was still under investigation, and that when the investigation was completed and before final action he would be notified and granted a hearing if necessary; that on April 24, 1918, Mr. Glasgow again wrote to Deputy Commissioner Speer (Exhibit 10) as follows:

"Referring to the above matter, about which I saw you yesterday, Tuesday, morning: I understand the situation to be now, in view of your letter to me of April 1, as confirmed in our conversation, that the 'question of Mr. duPont's liability is still under investigation, and when the investigation is completed and before final action has been taken' that you will notify me, and 'if a hearing is found necessary' my request for a hearing will be granted.

"If you could put me in touch with the proper man in your organization to consider this question, I think I have in my possession all of the documentary material which it would be necessary for him to have; and as I am so firm in my conclusion that the matter is entirely governed by the case of Towne v. Eisner, I think I could convince the proper representative of your bureau."

Affiant is informed and believes that on September 6, 1918, the Bureau of Internal Revenue addressed a letter to the complainant (Exhibit 11), requesting that in order to complete the audit of his income tax return for 1915 complainant file a statement in reply to the following questions:

"1. The number of shares owned by you and the fair market value per share of the E. I. duPont de Nemours Powder Company stock as of March 1, 1913.

"2. Did you purchase any of such stock after March 1, 1913, and what did it cost per share?

57 "3. The fair market value of the E. I. duPont de Nemours and Company stock (the new company) at time said stock was received in exchange for the stock of the old company.

"4. The exact date you received your shares of stock in the new company and the manner in which you determined the fair market value of same.

"5. The number of shares of stock owned by you in the Powder Company at time of distribution of the new company's stock, and the number of shares of new stock received in exchange for the old."

And that complainant made no reply to said request for information. Affiant is informed and believes that on July 22, 1919, Internal Revenue Agents Joseph N. Benners and D. P. du Ross submitted to the internal revenue agent in charge at Baltimore a report (Exhibit 12) of a reinvestigation of the income tax liability of complainant for the year 1915, in which it was reported that the complainant had during the year 1915 received from E. I. duPont de Nemours Powder Company of New Jersey 75,534 shares of common stock of the Delaware Corporation in the form of a dividend distribution, said shares of stock having a fair market valuation of $347.50 per share on the date of the distribution, i. e., October 1, 1915.

On or about December 13, 1919, affiant received from the Commissioner of Internal Revenue a letter dated December 12, 1919 (Exhibit 13), in tenor as follows:

"Reference is made to your report dated November 30, 1917, and supplemental reports dated April 19, 1918, and July 30, 1919, covering an investigation by examining officers Joseph N. Benners and

D. P. du Ross of the income tax liability of the above named individual for 1913 to 1917, inclusive, which as audited in this
58 office indicates further taxes for 1913, 1915, 1916, and 1917, and an overpayment for 1914.

"The further tax for 1913, $2,584.19, has been assessed.

"In accordance with section 252, revenue act of 1918, the overpayment of $978.61 for 1914 has been applied against the further tax for 1915, $1,576,994.47, and the balance, $1,576,015.86, together with the further tax for 1916, $442.00, and for 1917, $1,235.71, a total of $1,577,693.57 will be assessed on the next list furnished the collector of internal revenue for the District of Delaware.

"The audit in this office discloses an overpayment for 1914 of $978.61, due to allowing credit for the tax paid at source in excess of the correct normal tax liability.

"The difference in the tax due for 1915 as shown by your supplemental report dated July 30, 1919, and that stated above, is due to treating as income the dividend of 75,534 shares of stock of E. I. duPont de Nemours and Company, received by the taxpayer by reason of his ownership of 37,767 shares of the stock of the E. I. duPont de Nemours Powder Company. The value of this stock as of date of receipt was $347.50 per share as determined from facts submitted to this office.

"Previous office holdings in the case are superseded by the above, which is based on a more complete statement of facts than was available when the earlier conclusions were reached.

"The item of taxes paid within the year as shown by the examining officers' report is reduced $978.61, due to the overpayment of tax for 1914 of a like amount.

59 "These adjustments result in increasing the further tax as recommended by the examining officers from $1,361,500.35 to $1,576,994.47.

"The excess of the wife's dividends over the normal taxable income for 1917, $4,458.71, has been applied against the husband's net income before computing the normal tax, which results in a further tax of $1,235.71 instead of $1,414.05, as recommend by the examining officer.

"The taxpayer should be advised of the result of the office audit.

"A copy of this letter will be furnished the collector of internal revenue for the district of Delaware."

On or about December, 1919, affiant received from the Commissioner of Internal Revenue, Washington, D. C., an assessment list containing an assessment against the complainant for additional income taxes for the year 1915 in the sum of $1,576,015.86, and for the years 1915, 1916, and 1917 the total sum of $1,577,693.57, with the direction that demand be made upon the complainant for said amount. In accordance with the directions of the Commissioner of Internal Revenue, affiant on December 31, 1919, made demand upon the complainant for the payment of the additional income taxes assessed as aforesaid. That complainant never paid said assess-

ment in response to said demand, but on January 1, 1920, replied to affiant by letter (Exhibit 14), saying that the demand was improper and illegal; and that on January 4, 1920, the Bureau of Internal Revenue addressed a letter to the complainant informing him, among other things, that the assessment was legal and proper and that therefore "the demand notice dated January 10, 1920, is returned with the suggestion that you pay the tax as thereon indicated, thereby avoiding the collection of same by the collector of your district through distraint."

60 Affiant is informed and believes that on February 2, 1920, a hearing (transcript attached marked "Exhibit 15") was granted to Mr. William A. Glasgow, jr., as attorney for complainant and others, by the Commissioner of Internal Revenue at Washington, D. C. At said hearing counsel for complainant requested, among other things, that he be permitted to postpone the filing of a claim for abatement of the additional tax assessed against him until a decision had been reached by the courts of Pennsylvania in the case of Philip F. duPont. He was informed that under the provisions of the law there was no authority granted for the postponement of a claim for abatement and was advised to either pay the tax in accordance with the demand notice sent by the collector or immediately file his claim for abatement thereof as provided by law. On March 8, 1920, complainant filed with the affiant a claim for abatement of the additional income tax for the year 1915, assessed as aforesaid in the sum of $1,576,015.86, which said claim for abatement was rejected by the Commissioner of Internal Revenue February 3, 1922 (Exhibit 16). Affiant further states that he has not, since his demands of December 31, 1919, and January 10, 1920, made any effort to collect the above-mentioned assessment of additional income taxes for the year 1915, against the complainant by distraint against the complainant's property, or otherwise.

Affiant is informed by an examination of the records of the Bureau of Internal Revenue, and therefore believes, that on February 16, 1920, certain stockholders of the duPont Powder Company of New Jersey, by their attorney, directed a letter (Exhibit 17) to the Commissioner of Internal Revenue, requesting that a test case be agreed upon to determine the taxability of the dividends received by such stockholders on October 1, 1915, in the common stock of the Delaware corporation; that for the purposes of the case one of the claims for abatement filed by one of said stockholders be rejected; that a claim for refund be filed by such stockholder and disposed of promptly by rejection in order that a suit might be filed im-

61 mediately in the Court of Claims in order to get a speedy judicial determination of the case; and further requesting the cooperation of the bureau to expedite the disposition of the case, first in the Court of Claims and then in the Supreme Court, and stating "that if this course can be pursued and the claimants for abatement are permitted to await the decision of the Supreme Court they will abide by that decision, whatever it may be, and pay what-

ever tax is due by them, following the decision of the court, without its being necessary to sue or other legal steps being taken to collect the taxes."

Affiant is further informed from an examination of the records of the bureau, and believes, that the Commissioner of Internal Revenue, desiring to make no distinction between the stockholders of said duPont Powder Company of New Jersey, in agreeing to defer action until after the decision of the Supreme Court in a test case, directed that action should be withheld in all cases pending the determination of the question by decision of the Supreme Court as to the taxability of the dividends distributed as aforesaid.

Affiant is informed, and believes, that the case of Charles W. Phellis, a stockholder of the duPont Powder Company of New Jersey, who received 500 shares of the common stock of the Delaware Corporation upon the distribution thereof by the New Jersey Company on October 1, 1915, was selected as a test case by counsel for certain of the stockholders of the New Jersey Company, and that it was understood and agreed between such stockholders and the Commissioner of Internal Revenue that action on the claim of stockholders for abatement of the taxes as assessed against them on account of said distribution of stock would be withheld pending decision by the Supreme Court of the United States of the question of whether said stock so distributed constituted taxable income to the distributees. The case having come on for hearing before the Court of Claims, the court upon the evidence found as a fact, inter alia, that—

62 "The fair market value of the stock of the New Jersey corporation on the 30th day of September, 1915, was $795 per share, and the fair market value of the stock of said New Jersey corporation, after the execution of the contracts between two corporations, was, on October 1, 1915, $100. The fair market value of the stock of the Delaware Corporation, distributed as aforesaid, was, on October 1, 1915, $347.50 per share." (Copy of decision Ct. Cl. dated March 14, 1921, attached, marked "Exhibit 18.")

The court decided as a matter of law that the dividends so distributed were not taxable income and that the plaintiff was entitled to recover. This decision was reviewed by the Supreme Court of the United States on appeal, and on December 21, 1921, the Supreme Court handed down its decision (copy attached, marked "Exhibit 19"), reversing the judgment of the Court of Claims as to its conclusion of law and holding that on the facts as found by the Court of Claims the dividends distributed by the New Jersey Corporation in the common stock of the Delaware Corporation were taxable income to the plaintiff. That Mr. Glasgow, as attorney for the complainant herein and other stockholders, intervened in said case in the Court of Claims and in the Supreme Court, filed briefs, and participated in the oral argument.

Affiant is further informed, and believes, that since the decision of the Supreme Court, aforesaid, the plaintiff in this suit, and other

stockholders represented by Mr. Glasgow, made application to the Commissioner of Internal Revenue for a revision of the fair market value per share of the common stock of the Delaware Corporation as of October 1, 1915, claiming that the value of $347.50 per share found by the Bureau of Internal Revenue and the Court of Claims was too high; that in response to such appeal the commissioner submitted the question as to the fair market value of the stock on October 1, 1915, to the Committee on Appeals and
63 Review of the Bureau of Internal Revenue, which committee, after examining further evidence and hearing interested parties, submitted its opinion to the commissioner that the fair market value of the common stock of the Delaware Corporation on October 1, 1915, was $347.50 per share, as found by the Court of Claims in the case of Charles W. Phellis v. United States.

(Sgd) HARRY T. GRAHAM.

Sworn to and subscribed before me this 14th day of February, 1922.

[SEAL.] H. C. MAHAFFY, JR.,

Notary Public in and for New Castle County.

UNITED STATES OF AMERICA.
TREASURY DEPARTMENT, *February 11, 1922.*

Pursuant to section 882 of the Revised Statutes—

I hereby certify that the annexed are true copies of the original annual net income, the amended return, and the return for information for the year 1915, filed by Alfred I. duPont, Wilmington, Delaware; claim for abatement of $1,576,015.86; record of taxpayers conference dated February 2, 1920; letter of February 24, 1916, from Alfred I. duPont to Internal Revenue Collector Miles; copy of letter of February 25, 1916, from acting assistant to the commissioner, to internal revenue agent in charge, Baltimore; letter of January 1, 1920, from Alfred I. duPont to Internal Revenue Collector Graham; letter of January 24, 1920, from acting assistant to the commissioner, Newton, to Alfred I. duPont; letter of February 16, 1920 from F. S. Bright to commissioner; copy of letter of March 5, 1920, from the commissioner to F. S. Bright; letter of March 8, 1920 from
64 Collector Graham to the commissioner; inter-office memo of March 10, 1920, from G. V. N. (G. V. Newton, deputy commissioner) to Mr. Morman (head claims division); a copy of letter of April 21, 1920, from Deputy Commissioner Newton to Mr. William A. Glasgow, jr.; copy of letter (undated) from commissioner to Mr. Alfred I. duPont, on file in this department.

In witness whereof I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

Thesaur.*Amer.* Septent. * Sigil.

By direction of the Secretary.

ELMER DOVER,
Assistant Secretary of the Treasury.

EXHIBIT 1 TO AFFIDAVIT.

To be filled in by collector.

Assessment List 23-B .....
(Month.)
Folio..... *Line*.....

Above space to be stamped by collector, showing district and date received.

Form 1040 (Revised).

INCOME TAX.

THE PENALTY.

For failure to have this return in the hands of the collector of Internal Revenue on or before March 1 is $20 to $1,000.

(See Instructions on page 4.)

UNITED STATES INTERNAL REVENUE.

To be filled in by Internal Revenue Bureau.

File No.....

Examined by.....

Audited by.....

IMPORTANT.

Read this form through carefully. Fill in pages 2 and 3 before making entries on first page.

RETURN OF ANNUAL NET INCOME OF INDIVIDUALS.

(As provided by act of Congress approved October 3, 1913.)

INCOME RECEIVED OR ACCRUED DURING THE YEAR ENDED DECEMBER 31, 1915.

Filed by (or for) Alfred I. duPont, of Wilmington, Delaware.

COMPLETE ANSWERS SHOULD BE GIVEN TO THE FOLLOWING QUESTIONS.

Did you render a return of income for the preceding year? Yes. If so, in what Internal Revenue District was it filed? Present.
Were you *single or married* with wife or husband living with you on December 31 of the year for which this return is rendered? Yes. If married, give full name of wife or husband. Alicia duPont.
Has your wife or husband income from sources independent of your own? Yes.
Have you included your wife's or husband's income in this return? No.

	Millions.	Thou.	Hundreds.	Cents.
1. Gross income (brought from line 28)	$ 3	4 0 5	2 9 0	41
2. General deductions (brought from line 36)	$	1 1	9 5 7	10
3. Net income	$ 3	3 9 3	3 3 3	31

Specific deductions and exemptions allowed in computing normal tax of 1 per cent.

	Millions	Thou.	Hundreds	Cents
4. Dividends (brought from line 27)	$ 3	3 5 2	2 1 4	99
5. Income on which the normal tax has been paid or is to be paid at the source (brought from line 23, Column A)	$	1 4	0 0 0	00
6. Specific exemption of $3,000 or $1,000, as the case may be	$		0 0 0	00
NOTE.—If separate return is made by husband or wife and exemption is prorated, state amount claimed by: Husband $4,000.00 / Wife $				
7. Total deductions and exemptions (Items 4, 5, and 6)				3 3 6 7 2 1 4 99
8. Taxable income on which the normal tax of 1 per cent is to be calculated				2 6 1 1 8 32

NOTE.—When the net income shown above on line 3 exceeds $20,000, the additional tax thereon must be calculated as per schedule below.

	INCOME. Millions	Thou.	Hundreds	Cents	TAX. Millions	Thou.	Hundreds	Cents
One per cent on amount over $20,000 and not exceeding $50,000	$	5 0	0 0	00	$		3 0	00
Two per cent on amount over $50,000 and not exceeding $75,000	$	2 5	0 0	00	$		5 0	00
Three per cent on amount over $75,000 and not exceeding $100,000	$	2 5	0 0	00	$		7 5	00
Four per cent on amount over $100,000 and not exceeding $250,000	$ 1	5 0	0 0	00	$		6 0	00
Five per cent on amount over $250,000 and not exceeding $500,000	$ 2	5 0	0 0	00	$	1 2	5 0	00
Six per cent on amount over $500,000	$ 2 8	9 3	3 3	31	$	1 7	3 6	00
9. Total additional or super tax					$	1 9	3 6	5 0 00
10. Total normal tax (1 per cent of amount entered on line 8)					$		2 6	1 18
11. Total tax to be paid					$	1 9	3 9	1 1 18

RETURN OF ANNUAL NET INCOME OF INDIVIDUALS—Continued.

GROSS INCOME.

This statement must show in the proper spaces the ENTIRE AMOUNT of gains, profits, and income received by or accrued to the individual from all sources during the year specified on page 1, EXCEPT income derived from the obligations of the United States or any of its possessions, or of any State or political subdivision thereof, including district drainage bonds, and amounts paid by a State or any political subdivision thereof for services rendered as an officer or employee.

DESCRIPTION OF INCOME. NOTE.—If husband and wife render separate returns, only the income and deductions of the husband or wife (as the case may be) who renders *this return* shall be included herein; but if separate returns are not rendered by both husband and wife the income and deductions of both husband and wife shall be included separately as provided on this form.	A. Income on which the tax has been paid or is to be paid at the source.												B. Income on which the tax has NOT been paid or is not to be paid at the source.											
	Millions.			Thou.		Hundreds.			Cents.				Millions.			Thou.		Hundreds.			Cents.			
Total amount derived from—																								
12. Salaries and wages	$				1	1	0	0	0	00			$				4	0	0	0	00			
Wife's income																								
13. Professions and vocations																								
Wife's income																								
14. Business, trade, commerce, or sales, or dealings in property, whether real or personal																								
Wife's income	$												$						1	7	80			
15. Rents																								
Wife's income																								
16. *Interest* on notes, mortgages, bank deposits, and securities other than reported on lines 17 and 20																	9	4	4	4	77			
Wife's income																								
17. *Interest* on bonds, mortgages, or deeds of trust, or other similar obligations of domestic corporations, joint stock companies or associations, and insurance companies																2	8	6	1	2	85			
Wife's income																								
18. Fiduciaries[8] (excepting dividends from domestic corporations, which must be included as indicated in line 26 below)																								
Wife's income																								
19. Partnership gains and profits, whether distributed or not. (*Net* gains or profits must be reported here)																								
Wife's income																								
20. Interest upon bonds issued in foreign countries and upon *foreign mortgages* or like obligations (not payable in the United States), and also dividends upon the stock or interest upon the obligations of foreign corporations, associations, and insurance companies engaged in business in foreign countries																								
Wife's income																								

21. Royalties from mines, oil wells, patents, franchises, or other legalized privileges																					
Wife's income																					
22. Other sources not enumerated above																					
Wife's income																					
NOTE.—State here sources from which income entered on line 22 is received and amount received from each.																					
23. Totals (NOTE.—Enter total of column A on line 5)	$				1	1	0	0	0	00	$				4	2	0	7	5	42
24. Aggregate totals of columns A and B											$				5	3	0	7	5	42
25. Dividends on stock or from the net earnings of domestic corporations, joint stock companies, associations, or insurance companies subject to like tax	$		3	3	5	2	2	1	4	99										
26. Dividends received through fiduciaries (see line 18)																				
27. Total dividends (to be entered on line 4)	$		3	3	5	2	2	1	4	99	$		3	3	5	2	2	1	4	99
28. Total gross income (to be entered on line 1)											$		3	4	0	5	2	9	0	41

* There should be included under this item all income received from guardians, trustees, executors, administrators, agents, receivers, conservators, or other persons acting in a fiduciary capacity.

67

RETURN OF ANNUAL NET INCOME OF INDIVIDUALS—Continued.

GENERAL DEDUCTIONS.

NOTE.—Claims for deductions can not be allowed unless the information required below is clearly set forth.

	Millions.	Thou.	Hundreds.	Cents.
29. The amount of necessary expenses actually paid within the calendar year, for which the return is made, in carrying on any *individual business*. There *must not* be included under this head personal, living, or family expenses, business expenses of partnerships, or cost of merchandise. Amounts paid for permanent improvement or betterment of property are not proper expense deductions.	$			
Wife's deduction				
NOTE.—State on the following lines the principal businesses in which the above expenses were incurred.				
30. All interest paid within the year on personal indebtedness of taxpayer		9	9 0	56
Wife's deduction				
31. All national, State, county, school, and municipal taxes paid within the year (not including those assessed against local benefits)		2	0 5	54
Wife's deduction				
32. Losses actually sustained during the year incurred in trade or arising from fires, storms, or shipwreck, and not compensated by insurance or otherwise				
Wife's deduction				
NOTE.—State (*a*) of what the loss consisted, (*b*) when it was actually sustained, and (*c*) how it was determined to be a loss.				
33. Debts past due which have been actually ascertained to be worthless and which have been charged off within the year				
Wife's deduction				
NOTE.—State (*a*) of what the debts consisted, (*b*) when they were created, (*c*) when they became due, and (*d*) how they were actually determined to be worthless.				
34. Amount representing a reasonable allowance for the *exhaustion, wear, and tear of property arising out of its use or employment in business*. No deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which a deduction is claimed elsewhere in this return				
Wife's deduction				
NOTE.—State (*a*) what the property was on which depreciation is taken (if buildings, state when erected, of what material constructed, and value of same, as of January 1, of the calendar year for which this return is rendered), and (*b*) what percentage of depreciation is claimed.				
35. Amount allowed to cover depletion in case of mines and oil wells, not to exceed 5 per cent of the gross value at the mine or well of the output for the calendar year for which this return is rendered				
Wife's deduction				
NOTE.—State (*a*) cost of mine or well, (*b*) gross value at the mine or well of the output for the calendar year for which this return is rendered, and (*c*) what percentage of depletion is claimed.				
36. Total "General Deductions" (to be entered on line 2)	$	1 1	9 5 7	10

NOTE.—If space is insufficient for answering any questions, attach a supplemental sheet to this return.

c2—7357

AFFIDAVIT TO BE EXECUTED BY INDIVIDUAL MAKING HIS OWN RETURN.

I swear (or affirm) that the foregoing return, to the best of my knowledge and belief, contains a true and complete statement of all taxable gains, profits, and income received by or accrued to me during the year for which the return is made, and that I am entitled to all the deductions and exemptions entered or claimed therein under the Federal income tax law of October 3, 1913.

Sworn to and subscribed before me this eighteenth day of February, 1916. ALFRED I. DUPONT.
[SEAL.]

THEODORE W. FRANCIS,
Notary Public.

AFFIDAVIT TO BE EXECUTED BY DULY AUTHORIZED AGENT MAKING RETURN FOR INDIVIDUAL.

I swear (or affirm) that I have sufficient knowledge of the affairs and property of ..... to enable me to make a full and complete return of the taxable income thereof, and that the foregoing return, to the best of my knowledge and belief, contains a true and complete statement of all the taxable gains, profits, and income received by or accrued to said individual during the year for which the return is made, and that the said individual is entitled under the Federal income tax law of October 3, 1913, to all the deductions and exemptions entered or claimed therein, and that I am authorized to make this return for the following reasons:

.....
.....
.....

.....
(Signature of agent.)

Sworn to and subscribed before me this.....day of....., 191—. .....
[SEAL.] (Post-office address of agent.)

.....
.....
(Official capacity.)

INSTRUCTIONS.

1. This return shall be made by every citizen of the United States, whether residing at home or abroad, and by every person residing in the United States, though not a citizen thereof, having a *net income* of $3,000, or over, for the taxable year.

2. This return shall be made by every *nonresident alien* deriving any net income from property owned and business, trade, or profession carried on in the United States by him. No specific exemption is allowed nonresident aliens.

3. When an individual by reason of minority, sickness, or other disability, or absence from the United States, is unable to make his own return, it may be made for him by his *duly authorized* representative.

4. This return should be filed with the collector of internal revenue for the district in which the individual resides. In case the person resides in a foreign country, then with the collector for the district in which his principal business is carried on in the United States.

5. When the return is not filed within the required time by reason of sickness or absence of the individual, an extension of time, not exceeding 30 days from March 1, within which to file such return *may be* granted by the collector, *provided* a written application therefor is made by the individual within the period for which such extension is desired.

6. This return, properly filled out, must be made under oath or affirmation. Affidavits may be made before any officer *authorized by law* to administer oaths.

7. An unmarried individual or married individual not living with husband or wife shall be allowed an exemption of $3,000. When husband and wife live together, they shall be allowed jointly a total exemption of only $4,000 on their aggregate income. Either husband or wife may make, sign, and verify a return of their joint income. Where husband and wife have separate incomes, they make a joint return of such separate income, both subscribing to the return, or they may make separate returns of their respective incomes, but in no case shall they claim or be allowed more than $4,000 exemption on their aggregate incomes.

8. Amounts charged on line 29 for restoring property or making good the exhaustion thereof from its use in business, together with the amount claimed for depreciation on line 34, must not exceed the deterioration of the property in one year.

69 EXHIBIT 2 TO AFFIDAVIT.

FEBRUARY 24, 1916.

MR. JOSHUA W. MILES,
Internal Revenue Collector,
Baltimore, Md.

DEAR SIR: I find on going over my income tax return that I made an error in the valuation of a dividend declared by the duPont Company last June of 5%, payable in Atlas Powder Company's preferred stock. In estimating the value of this, I took the value of the common stock at that time, instead of the preferred. The net result of this error is that the valuation which I placed on this stock was $319,207.20, when it should have been $181,281.60, or a difference of $137,925.60, which should not have been declared. This would show a net reduction in the amount of tax which I have to pay in amount of $8,275.54.

If you will return my declaration to me with a new blank, I will make it out correctly, or if you prefer to credit me on account of this error, it will be perfectly satisfactory to me.

As a matter of fact, it is not clear to me that this dividend declared in Atlas Powder Company's preferred stock should be treated as ordinary income, as it was not a declaration of profits by the duPont Company but one of assets, and therefore reduced the value of my holdings in the duPont Company just that much. In other words, if the duPont Company were to liquidate and distribute all its assets among its stockholders, this surely would not be treated as income. This Atlas stock was distributed for the reason that these values originally appeared as bonds of the Atlas Company and were afterwards taken up and exchanged by the Atlas Company for preferred stock. Inasmuch as under the decree of dissolution the duPont Company was prohibited from holding stock in this company, it became necessary to distribute it, and therefore the distribution was one of capital values and not a distribution of earnings. My under-
70 standing of the principle of the income tax is that this distribution of capital value should not have been declared as income, which I have done.

Yours truly,

ALFRED I. DUPONT.

TO BE FILLED IN BY COLLECTOR.

Assessment List 23-B ..... MAR 1916
(Month.)

Folio 3[illegible] REVENUE

INTERNAL REVENUE RECEIVED MAR 1916 ST OF MD.

Space to be stamped by Collector, with district and date received.

Form 1040 (Revised).

INCOME TAX.

THE PENALTY

FOR FAILURE TO HAVE THIS RETURN IN THE HANDS OF THE COLLECTOR OF INTERNAL REVENUE ON OR BEFORE MARCH 1 IS $20 TO $1,000.

(SEE INSTRUCTIONS ON PAGE 4.)

TO BE FILLED IN BY INTERNAL REVENUE BUREAU.

File No. 14

Audited by .....

IMPORTANT.
Read this form through carefully.
Fill in pages 2 and 3 before making entries on first page.

UNITED STATES INTERNAL REVENUE.

RETURN OF ANNUAL NET INCOME OF INDIVIDUALS.

(As provided by Act of Congress, approved October 3, 1913.)

INCOME RECEIVED DURING THE YEAR ENDED DECEMBER 31, 191 1915

Filed by ..... Alfred I. du Pont, of .....
(Street and number.)
..... Wilmington, Del.
(Post-office address.) (State.)

ANSWERS SHOULD BE GIVEN TO THE FOLLOWING QUESTIONS.

Did you render a re[illegible] the preceding year? Yes. If so, in what Internal Revenue District was it filed? .....

Were you *single* or *marr*[illegible] husband living with you on December 31, of the year for which this return is rendered? .....

If married, give full name[illegible] ..... Alice Dalton

Has your wife or husband in[illegible] independent of your own? ..... Yes

Have you included your wife's [illegible]e in this return? ..... No

	Millions	Thousands	Hundreds	Cents
1. Gross Income (brought from line [illegible]				
2. General Deductions (brought from [illegible]				
3. Net Income	$			

TRANSCRIPT MADE 1/10/17

Specific deductions and exemptions a[illegible]d in computing normal tax of 1 per cent.

Millions	Thousands	Hundreds	Cents
1	61	11	

4. Dividends (brought from line 27) .... $
5. Income on which the normal tax has been paid or is to be paid at the source (brought from line 23, Column A) .... $
6. Specific exemption of $3,000, or $4,000, as the case may be .... $

Note.—If separate return is made by husband or wife and exemption is prorated, state amount claimed by: Husband .... $; Wife ....

7. Total deductions and exemptions (Items 4, 5, and 6) ....
8. Taxable Income on which the normal tax of 1 per cent is to be calculated ....

NOTE.—When the net income shown above on line 3 exceeds $20,000 the additional tax thereon must be calculated as per schedule below.

	INCOME. (Millions, Thousands, Hundreds, Cents)	TAX. (Millions, Thousands, Hundreds, Cents)
One per cent on amount over $20,000 and not exceeding $50,000	$ [illegible]	$
Two per cent on amount over $50,000 and not exceeding $75,000	$ [illegible]	$
Three per cent on amount over $75,000 and not exceeding $100,000	$ [illegible]	$
Four per cent on amount over $100,000 and not exceeding $250,000	$ 150 000 00	$
Five per cent on amount over $250,000 and not exceeding $500,000	$ 250 000 00	$
Six per cent on amount over $500,000	$ 2 775 407 71	$

9. Total additional or super tax .... $
10. Total normal tax (1 per cent of amount entered on line 8) .... $
11. Total tax to be paid .... $

2—7357

Claim for abatement of $1576031.86 rejected 1/16/22

EXHIBIT 3 TO AFFIDAVIT.

FEBRUARY 25, 1916.

MR. ALFRED I. DUPONT, *Wilmington, Del.*

SIR: I have your favor of February 24, 1916, and am holding your original return in order that you may submit an amended return in proper form.

Please mark your return "Amended," and let us have it as soon as convenient.

Respectfully,

Collector.

BRY

GROSS INCOME.

This statement must show in the proper spaces the ENTIRE AMOUNT of gains, profits, and income received by the individual *from* all dources during the year specified on page 1, EXCEPT income derived *from* the obligations of the United States or any of its possessions, or of any State or political subdivision thereof, including district drainage bonds, and amounts paid by a State or any political subdivision thereof for services rendered as an officer or employee.

DESCRIPTION OF INCOME. NOTE.—If husband and wife render separate returns, only the income and deductions of the husband or wife (as the case may be) who renders *this return* shall be included herein: but if separate returns are not rendered by both husband and wife the income and deductions of both husband and wife shall be included separately as provided on this form.	A. Income on which the tax has been paid or is to be paid at the source.									B. Income on which the tax has NOT been paid or is not to be paid at the source.									
Total amount derived from—	Millions.		Thou.		Hundreds.			Cents.		Millions.		Thou.		Hundreds.			Cents.		
12. Salaries and wages	$			1	1	0	0	0	00	$			4	0	0	0	00		
Wife's income																			
13. Professions and vocations																			
Wife's income																			
14. Business, trade, commerce, or sales, or dealings in property, whether real or personal																			
Wife's income																			
15. Rents															1	7	80		
Wife's income																			
16. *Interest* on notes, mortgages, bank deposits, and securities other than reported on lines 17 and 20													9	4	4	4	77		
Wife's income																			
17. *Interest* on bonds, mortgages or deeds of trust, or other similar obligations of domestic corporations, joint-stock companies or associations, and insurance companies													2	8	6	1	2	85	
Wife's income																			
18. Fiduciaries * (excepting dividends from domestic corporations, which must be included as indicated in line 26 below)																			
Wife's income																			
19. Partnership gains and profits, whether distributed or not. (*Net* gains or profits must be reported here)																			
Wife's income																			
20. Interest upon bonds issued in foreign countries and upon *foreign mortgages* or like obligations (not payable in the United States), and also dividends upon the stock or interest upon the obligations of foreign corporations, associations, and insurance companies engaged in business in foreign countries																			
Wife's income																			
21. Royalties *from* mines, oil wells, patents, franchises, or other legalized privileges																			
Wife's income																			
22. Other sources not enumerated above																			
Wife's income																			
NOTE.—State here sources from which income entered on line 22 is received and amount received *from* each.																			
23. Totals (NOTE.—Enter total of column A on line 5)	$			1	1	0	0	0	00	$			4	2	0	7	5	42	

24.	Aggregate totals of columns A and B																					
25.	Dividends on stock or from the net earnings of domestic corporations, joint-stock companies, associations, or insurance companies subject to like tax	$		3	2	1	4	2	8	9	39	$				5	3	0	7	5	42
26.	Dividends received through fiduciaries (see line 18)																				
	Wife's income																				
27.	Total dividends (to be entered on line 4)											$		3	2	1	4	2	8	9	39
28.	Total gross income (to be entered on line 1)											$		3	2	6	7	3	6	4	81

* There should be included under this item all income received from guardians, trustees, executors, administrators, agents, receivers, conservators, or other persons acting in a fiduciary capacity.

GENERAL DEDUCTIONS.

NOTE.—Claims for deductions can not be allowed unless the information required below is clearly set forth.

	Millions	Thou.	Hundreds	Cents
29. The amount of necessary expenses actually paid within the calendar year, for which the return is made, in carrying on any *individual business*. There *must not* be included under this head personal, living, or family expenses, business expenses of partnerships, or cost of merchandise. Amounts paid for permanent improvement or betterment of property are not proper expense deductions				
Wife's deduction	$			
NOTE.—State on the following lines the principal businesses in which the above expenses were incurred.				
30. All interest paid within the year on personal indebtedness of taxpayer		9	9 0 5	36
Wife's deduction				
31. All national, State, county, school, and municipal taxes paid within the year (not including those assessed against local benefits)		2	0 5 1	54
Wife's deduction				
32. Losses actually sustained during the year incurred in trade or arising from fires, storms, or shipwreck, and not compensated by insurance or otherwise				
Wife's deduction				
NOTE.—State (*a*) of what the loss consisted, (*b*) when it was actually sustained, and (*c*) how it was determined to be a loss.				
33. Debts past due which have been actually ascertained to be worthless and which have been charged off within the year				
Wife's deduction				
NOTE.—State (*a*) of what the debts consisted, (*b*) when they were created, (*c*) when they became due, and (*d*) how they were actually determined to be worthless.				
34. Amount representing a reasonable allowance for the *exhaustion, wear, and tear of property arising out of its use or employment in business*. No deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which a deduction is claimed elsewhere in this return				
Wife's deduction				
NOTE.—State (*a*) what the property was on which depreciation is taken (if buildings, state when erected, of what material constructed, and value of same, as of January 1, of the calendar year for which this return is rendered), and (*b*) what percentage of depreciation is claimed.				
35. Amount allowed to cover depletion, in case of mines and oil wells, not to exceed 5 per cent of the gross value at the mine or well of the output for the calendar year for which this return is rendered				
Wife's deduction				
NOTE.—State (*a*) cost of mine or well, (*b*) gross value at the mine or well of the output for the calendar year for which this return is rendered, and (*c*) what percentage of depletion is claimed.				
36. Total "General Deductions" (to be entered on line 2)	$	1 1	9 5 7	10

NOTE.—If space is insufficient for answering any questions, attach a supplemental sheet to this return.

c2—7857

AFFIDAVIT TO BE EXECUTED BY INDIVIDUAL MAKING HIS OWN RETURN. c2—7357

I swear (or affirm) that the foregoing return, to the best of my knowledge and belief, contains a true and complete statement of all taxable gains, profits, and income received by me during the year for which the return is made, and that I am entitled to all the deductions and exemptions entered or claimed therein under the Federal income tax law of October 3, 1913.

Sworn to and subscribed before me this 2d day of March, 1916.
[SEAL.]

ALFRED I. DUPONT.

THEODORE W. FRANCIS,
Notary Public.

AFFIDAVIT TO BE EXECUTED BY DULY AUTHORIZED AGENT MAKING RETURN FOR INDIVIDUAL.

I swear (or affirm) that I have sufficient knowledge of the affairs and property of.....to enable me to make a full and complete return of the taxable income thereof, and that the foregoing return, to the best of my knowledge and belief, contains a true and complete statement of all the taxable gains, profits, and income received by said individual during the year for which the return is made, and that the said individual is entitled under the Federal income tax law of October 3, 1913, to all the deductions and exemptions entered or claimed therein, and that I am authorized to make this return for the following reasons:

.....

.....

.....

.....
(Signature of agent.)

.....
(Post-office address of agent.)

Sworn to and subscribed before me this.....day of....., 191—.
[SEAL.]

.....

.....
(Official capacity.)

INSTRUCTIONS.

1. This return shall be made by every citizen of the United States, whether residing at home or abroad, and by every person residing in the United States, though not a citizen thereof, having a *net income* of $3,000, or over, for the taxable year.

2. This return shall be made by every *nonresident alien* deriving any net income from property owned and business, trade, or profession carried on in the United States by him. No specific exemption is allowed nonresident aliens.

3. When an individual by reason of minority, sickness, or other disability, or absence from the United States, is unable to make his own return, it may be made for him by his *duly authorized* representative.

4. This return should be filed with the collector of internal revenue for the district in which the individual resides. In case the person resides in a foreign country, then with the collector for the district in which his principal business is carried on in the United States.

5. When the return is not filed within the required time by reason of sickness or absence of the individual, an extension of time, not exceeding 30 days from March 1, within which to file such return *may be* granted by the collector, *provided* a written application therefor is made by the individual within the period for which such extension is desired.

6. This return, properly filled out, must be made under oath or affirmation. Affidavits may be made before any officer *authorized by law* to administer oaths.

7. An unmarried individual or married individual not living with husband or wife shall be allowed an exemption of $3,000. When husband and wife live together they shall be allowed jointly a total exemption of only $4,000 on their aggregate income. Either husband or wife may make, sign, and verify a return of their joint income. Where husband and wife have separate incomes they make a joint return of such separate income, both subscribing to the return, or they may make separate returns of their respective incomes, but in no case shall they claim or be allowed more than $4,000 exemption on their aggregate incomes.

8. Amounts charged on line 29 for restoring property or making good the exhaustion thereof from its use in business, together with the amount claimed for depreciation on line 34, must not exceed the deterioration of the property in one year.

76 EXHIBIT 5 TO AFFIDAVIT.

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
Baltimore, Md., November 30, 1917.

IT—Alfred I. duPont.
1913—1916.

Hon. D. C. ROPER,
Commissioner Internal Revenue, Washington, D. C.

SIR: Under date of the 27th instant Income Tax Inspector D. P. DuRoss reported as follows:

I have the honor to report on verification of attached transcripts 1913, 1914, and 1915 personal returns of Alfred I. duPont, Wilmington, Del., Dist. Md., also for the year 1916, to which latter year I extended investigation in the absence of transcript of return.

Additional tax disclosed.

1913	$2,584.19
1914	None.
1915	$455,246.07
1916	442.00
Total	$458,272.26

77 The respondent was vice president of the E. I. duPont de Nemours Powder Co., during the years 1913, 1914, and 1915, during which he received a salary of $15,000.00 per annum.

1913—Supplemental revision.

GROSS INCOME.

Salaries	(B)	$12,591.67
Interest		6,277.97
Interest on bonds	(A)	7,380.00
Interest " "	(B)	11,810.00
Dividends		$331,432.00
Total gross income		$369,491.64

DEDUCTIONS.

Interest	$11,371.54	
Taxes	1,306.25	
Bad debts	4,166.67	
		16,844.46
Net income		$352,647.18
Dividends	$331,432.00	
At source	7,380.00	
Exemption	3,333.33	
		342,145.33
Income subject to normal tax		$10,501.85
Normal tax 1%		105.02
Income subject 1% super tax	$30,000.00	300.00
" " 2% " "	25,000.00	500.00
" " 3% " "	25,000.00	750.00
" " 4% " "	150,000.00	6,000.00
" " 5% " "	102,647.18	5,132.36
Total tax liability		$12,787.38

Amount paid per original return	$7,325.94	
" assessed per original return	2,877.25	
Total amount of tax paid		$10,203.19
Additional tax per supplemental amended return		$2,584.19

78 Salaries, $12,500.00, reported in col. A, should have been reported in col. B, as the tax was not withheld at the source.

Interest on notes and deposits amounted to $6,277.97 for the taxable period instead of $5,231.64 as originally reported. (Increase $1,046.33.)

Interest on bonds, $5,925.00, reported in col. B, is in error, and should be $7,380.00, col. A, and $11,810.00, col. B, tax on the former amount having been withheld at the source. In preparation of the original return interest on bond was confused with dividends from stocks. (Increase $13,265.00.)

Dividends shown in original return in error. Amount received during taxable period amounted to $331,432.00 instead of $287,427.92 as originally reported. (Increase $44,004.08.)

Deductions general:

Interest, $11,371.54, correct. Representing five-sixths of the total paid within the year.

Taxes, $1,306.25, correct. Representing 5-6 of the total paid within the year.

Losses, $54,100.00, originally reported, represents loans of which $5,000.00 only was actually ascertained to be worthless during the year. The remaining amount, $49,100.00, represents loans to the Virginia Graphite Co. This company mergered with the Tonkin duPont Company of Wilberforce, Canada, in December, 1913. The latter company assumed the obligations of the former company, and was still in existence on December 31st: therefore, the amount $49,100.00 is disallowed. The $5,000.00 loan was to a lawyer in New York City, who died during the year 1913, leaving no property or assets. Of this amount 5-6, or $4,166.67, is apparently a proper deduction. (Decrease $49,933.33.)

79

Increase in gross income	$58,315.41		
Decrease in general deductions	49,933.33		
Additional net income	$108,248.74		
Subject to 4% super tax	5,601.56	or	$224.06
Additional amt. subject to super tax at 5%	102,647.18	or	5,132.36
Additional income subject to 1% normal tax	10,501.85	or	105.02
Total additional tax			$5,461.44
Amount previously assessed per amended ret			2,877.25
Additional tax due			$2,584.19

Duly executed amended return for taxable year 1913 is herewith enclosed.

1914.

Salaries	col. (A)	$14,850.00
Should be	col. (B)	15,000.00
The difference represents 1% tax withheld		150.00

Salary received during the year from E. I duPont de Nemours Co., Wilmington, Del., the normal tax being withheld at the source on the whole amount.

The other items of income found correct as reported.

Deductions:

Interest, $12,818.07, correct.

Taxes in error, amount of income tax paid omitted, $7,325.94.

Losses, $5,500.00, represent losses sustained during the year from fire, consisting of live stock and not compensated by insurance.

	Bad debts reported	$125,000.00
80	Includes loss on securities not allowable	45,000.00
	Amount actually ascertained to be worthless	80,000.00
	Amount disallowed in 1913 ascertained to be worthless in 1914	49,100.00
	(No additional tax)	$129,100.00

1915 (revised).

Salaries	(A)	11,000.00
Salaries	(B)	4,000.00
Rents		17.80
Interest		9,444.77
Interest bonds	(B)	$28,612.85
Totals A and B		$53,075.42
Dividends		$10,815,242.79
Total gross income		$10,868,318.21

GENERAL DEDUCTIONS.

Interest	$9,905.56	
Taxes	13,639.32	
		23,544.88
Net income		$10,844,773.33
Dividends	$10,815,242.79	
Source	11,000.00	
Exemption	4,000.00	
		10,830,242.79
Amount subject to normal tax		14,530.54
Normal tax 1%		145.31
1% super tax	$30,000.00	300.00
2% super tax	25,000.00	500.00
Amount carried forward		$945.31
81 Amount brought forward		$945.31
3% super tax	$25,000.00	750.00
4% super tax	150,000.00	6,000.00
5% super tax	250,000.00	12,500.00
6% super tax	$10,344,773.33	$620,686.40
Total tax liability		$640,881.71
" " previously paid		185,635.64
Additional tax		$455,246.07

Salaries, $11,000.00 and $4,000.00, col. A and B, respectively, received from the E. I. duPont de Nemours Co., Wilmington, Delaware. Amount in (A) represents amount in excess of exemption claimed.

Interest on bonds, $28,612.85, correct, and properly belongs in col. (B) exemption having been claimed at source on the whole amount.

DIVIDENDS.

Cash dividends reported			$3,033,007.79
5% pfd. stock dividends reported			181,281.60
Total dividends reported			$3,214,289.39
Cash dividends revised	$3,073,007.79		
Cash dividends reported	3,033,007.79		(increase).
Cash dividends previously omitted in error			$40,000.00
5% pfd. stock dividends revised at valuation placed upon it by the corporation	$188,835.00		
Reported at estimated market value	181,281.60		
Increase			$7,553.40
82 200% common stock dividend issued by E. I. duPont de Nemours Co., previously omitted			$7,553,400.00
Total increase in gross income			$7,600,953.40

DEDUCTIONS.

Interest correct		$9,905.56
Taxes originally reported		2,051.54
Taxes previously omitted:		
Income tax paid	$11,477.78	
Income tax at source	110.00	
		11,587.78
Taxes revised		$13,639.32
(Increase $11,587.78.)		
Increase gross income		$7,600,953.40
Increase in deductions		11,587.78
Additional net income		$7,589,365.62
Additional super tax		$455,361.94
Decrease in normal tax		115.87
Total additional tax		$455,246.07

1916 (revised).

GROSS INCOME.

Salaries	(B)	$478.55
Rents		600.82
Interest		$33,442.84
Interest bonds	(A)	32,553.00
Interest bonds	(B)	79,837.93
Dividends		$8,361,752.39
Dividends, fiduciary		6,030.00
Total gross income		$8,514,695.53

DEDUCTIONS.

Interest	$600.00	
Taxes	$190,943.97	
		$191,543.97
		$8,323,151.56

83	Dividends	$8,367,782.39	
	Exemption	4,000.00	$8,371,782.39
Income subject to normal tax			(None.)
Income subject to super tax 1%		$20,000.00	$200.00
Income subject to super tax 2%		20,000.00	400.00
Income subject to super tax 3%		20,000.00	600.00
Income subject to super tax 4%		20,000.00	800.00
Income subject to super tax 5%		50,000.00	2,500.00
Income subject to suepr tax 6%		50,000.00	3,000.00
Income subject to super tax 7%		50,000.00	3,500.00
Income subject to super tax 8%		50,000.00	4,000.00
Income subject to super tax 9%		200,000.00	18,000.00
Income subject to super tax 10%		500,000.00	50,000.00
Income subject to super tax 11%		500,000.00	55,000.00
Income subject to super tax 12%		500,000.00	60,000.00
Income subject to super tax 13%		6,323,151.56	$822,009.70
Total tax liability			$1,020,009.70
Total tax paid			$1,019,567.70
Additional tax			$ 442.00

Salaries, $35.00, reported (A), should have been reported (B), tax not having been withheld at source.

84 Items of income found correct.

Dividend reported from fiduciaries was received from the estate of B. G. duPont, Security Trust and Safe Deposit Co., Wilmington, Del., Trustees.

Taxes reported correct, represents income tax	$185,635.64
Additional income tax year 1913	2,877.25
Property tax	2,431.08
Total	$190,943.97

Losses reported $3,400.00 represents losses on securities and being in excess of gains from these sources is therefore disallowed.

Decreases in deductions	$3,400.00
Subject to 13% super tax	$3,400.00

I therefore recommend that Alfred I. duPont, Wilmington, Del., Dist. Md., be assessed as follows under the acts of October 3, 1913, and September 8, 1916:

Income tax for the year 1913	$2,584.19
" " " " " 1915	$455,246.07
" " " " " 1916	442.00
Total	$458,272.26

Transcripts for 1913, 1914, and 1915 together with amended return for 1913 are enclosed.

Copy of this report has been sent to Collector Miles.

Respectfully,

E. A. FORBES.
Internal Revenue Agent.

JMW/H.
Enclosures.

Exhibit 6 to Affidavit.

To be filled in by collector.

Assessment List 28-B .....

Folio ..... *Line* ..... (Month)

Above space to be stamped by collector showing district and date received.

Form 1040 (Revised).

INCOME TAX.

THE PENALTY.

For failure to have this return in the hands of the collector of internal revenue on or before March 1 is $20 to $1,000.

(See Instructions on page 4.)

UNITED STATES INTERNAL REVENUE.

To be filled in by Internal Revenue Bureau.

File No. .....

Audited by .....

IMPORTANT.

Read this form through carefully.
Fill in pages 2 and 3 before making entries on first page.

RETURN OF ANNUAL NET INCOME OF INDIVIDUALS.

(As provided by act of Congress, approved October 3, 1913.

INCOME RECEIVED DURING THE YEAR ENDED DECEMBER 31, 1915.

Filed by (or for) Alfred I. duPont, of Wilmington, Del.

COMPLETE ANSWERS SHOULD BE GIVEN TO THE FOLLOWING QUESTIONS.

Did you render a return of income for the preceding year? ..... If so, in what Internal Revenue District was it filed? .....

Were you *single or married* with wife or husband living with you on December 31, of the year for which this return is rendered? .....

If married, give full name of wife or husband. .....

Has your wife or husband income from sources independent of your own? .....

Have you included your wife's or husband's income in this return? .....

	Millions.			Thou.			Hundreds.			Cents.
1. Gross income (brought from line 28)	$ 2	2		7	6	4	9	2	3	21
2. General deductions (brought from line 36)	$				2	3	5	4	4	88
3. Net income	$ 2	2		7	4	1	3	7	8	33

EXHIBIT 6 TO AFFIDAVIT—Continued.

Specific deductions and exemptions allowed in computing normal tax of 1 per cent.

	Millions.	Thou.	Hundreds.	Cents.
4. Dividends (brought from line 27)	$ 3	2 6 1	8 4 2	79
5. Income on which the normal tax has been paid or is to be paid at the source (brought from line 23, column A)	$	1 1	0 0 0	00
6. Specific exemption of $3,000, or $4,000 as the case may be	$	4	0 0 0	00
NOTE.—If separate return is made by husband or wife and exemption is prorated, state amount claimed by: Husband $ ..... Wife $				
7. Total deductions and exemptions (Items 4, 5, and 6)		3	2 7 6 8 4 2	79
8. Taxable income on which the normal tax of 1 per cent is to be calculated		1	9 4 6 4 5 3 5	54

NOTE.—When the net income shown above on line 3 exceeds $20 000 the additional tax thereon must be calculated as per schedule below.

	INCOME. Millions.	Thou.	Hundreds.	Cents.	TAX. Millions.	Thou.	Hundreds.	Cents.
One per cent on amount over $20,000 and not exceeding $50,000	$	3 0	0 0 0	00	$		3 0 0	00
Two per cent on amount over $50,000 and not exceeding $75,000	$	2 5	0 0 0	00	$		5 0 0	00
Three per cent on amount over $75,000 and not exceeding $100,000	$	2 5	0 0 0	00	$		7 5 0	00
Four per cent on amount over $100,000 and not exceeding $250,000	$	1 5 0	0 0 0	00	$	6	0 0 0	00
Five per cent on amount over $250,000 and not exceeding $500,000	$	2 5 0	0 0 0	00	$	1 2	5 0 0	00
Six per cent on amount over $500,000	$ 1 8	9 6 4	5 3 5	54	$	1 3 3 4	4 8 2	70
9. Total additional or super tax					$	1 3 5	4 5 3 2	70
10. Total normal tax (1 per cent of amount entered on line 8)					$	1 9 4	6 4 5	36
11. Total tax to be paid					$	1 5 4	9 1 7 8	06

GROSS INCOME.

This statement must show in the proper spaces the ENTIRE AMOUNT of gains, profits, and income received by the individual from all sources during the year specified on page 1, EXCEPT income derived from the obligations of the United States or any of its possessions, or of any State or political subdivision thereof, including district drainage bonds; and amounts paid by a State or any political subdivision thereof for services rendered as an officer or employee.

DESCRIPTION OF INCOME. NOTE.—If husband and wife render separate returns, only the income and deductions of the husband or wife (as the case may be) who renders *this return* shall be included herein; but if separate returns are not rendered by both husband and wife the income and deductions of both husband and wife shall be included separately as provided on this form.	A. Income on which the tax has been paid or is to be paid at the source.				B. Income on which the tax has NOT been paid or is not to be paid at the source.			
	Millions.	Thou.	Hundreds.	Cents.	Millions.	Thou.	Hundreds.	Cents.
Total amount derived from—								
12. Salaries and wages	$	1 1	0 0 0	00	$	4	0 0 0	00
Wife's income								
13. Professions and vocations								
Wife's income								
14. Business, trade, commerce, or sales, or dealings in property, whether real or personal								
Wife's income								
15. Rents								
Wife's income								
16. *Interest* on notes, mortgages, bank deposits, and securities other than reported on lines 17 and 20							1 7	80
Wife's income								
17. *Interest* on bonds, mortgages or deeds of trust, or other similar obligations of domestic corporations, joint-stock companies or associations, and insurance companies						9	4 4	77
Wife's income								
18. Fiduciaries * (excepting dividends from domestic corporations, which must be included as indicated in line 26 below)						2	8 6	85
Wife's income								
19. Partnership gains and profits, whether distributed or not. (*Net* gains or profits must be reported here)								
Wife's income								
20. Interest upon bonds issued in foreign countries and upon *foreign mortgages* or like obligations (not payable in the United States), and also dividends upon the stock or interest upon the obligations of foreign corporations, associations, and insurance companies engaged in business in foreign countries								
Wife's income								
21. Royalties from mines, oil wells, patents, franchises, or other legalized privileges								
Wife's income								
22. Other sources not enumerated above					1	9 4	5 0	0 0 5 00
Wife's income								
NOTE.—State here sources from which income entered on line 22 is received and amount received from each.								
23. Totals (NOTE.—Enter total of column A on line 5)	$	1 1	0 0 0	00	$ 1	9 4	9 2	0 8 0 42

EXHIBIT G TO AFFIDAVIT—Continued.

DESCRIPTION OF INCOME. NOTE.—If husband and wife render separate returns, only the income and deductions of the husband or wife (as the case may be) who renders *this return* shall be included herein; but if separate returns are not rendered by both husband and wife the income and deductions of both husband and wife shall be included separately as provided on this form.	A. Income on which the tax has been paid or is to be paid at the source.										B. Income on which the tax has NOT been paid or is not to be paid at the source.									
	Millions.			Thou.			Hundreds.			Cents.	Millions.			Thou.			Hundreds.			Cents.
24. Aggregate totals of columns A and B																				
25. Dividends on stock or from the net earnings of domestic corporations, joint-stock companies, associations, or insurance companies subject to like tax	$	....	3	2	6	1	8	4	2	79										
Wife's income																				
26. Dividends received through fiduciaries (see line 18)																				
27. Total dividends (to be entered on line 4)											$	....	3	2	6	1	8	4	2	79
28. Total gross income (to be entered on line 1)											$	2	2	7	6	4	9	2	3	21

* There should be included under this item all income received from guardians, trustees, executors, administrators, agents, receivers, conservators, or other persons acting in a fiduciary capacity.

C2—7857

GENERAL DEDUCTIONS.

NOTE.—Claims for deductions can not be allowed unless the information required below is clearly set forth.

	Millions.			Thou.			Hundreds.			Cents.
29. The amount of necessary expenses actually paid within the calendar year for which the return is made in carrying on any *individual business*. There *must not* be included under this head personal, living, or family expenses, business expenses of partnerships, or cost of merchandise. Amounts paid for permanent improvement or betterment of property are not proper expense deductions	$									
Wife's deduction										
NOTE.—State on the following lines the principal business, in which the above expenses were incurred.										
30. All interest paid within the year on personal indebtedness of taxpayer						9	9	0	5	56
Wife's deduction										
31. All national, State, county, school, and municipal taxes paid within the year (not including those assessed against local benefits)						1	3	6	1	54
Wife's deduction										

32. Losses actually sustained during the year incurred in trade or arising from fires, storms, or shipwreck, and not compensated by insurance or otherwise.....

Wife's deduction.....

NOTE.—State (*a*) of what the loss consisted, (*b*) when it was actually sustained, and (*c*) how it was determined to be a loss.

33. Debts past due which have been actually ascertained to be worthless and which have been charged off within the year.....

Wife's deduction.....

NOTE.—State (*a*) of what the debts consisted, (*b*) when they were created, (*c*) when they became due, and (*d*) how they were actually determined to be worthless.

34. Amount representing a reasonable allowance for the *exhaustion, wear, and tear of property arising out of its use or employment in business*. No deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which a deduction is claimed elsewhere in this return.....

Wife's deduction.....

NOTE.—State (*a*) what the property was on which depreciation is taken (if buildings, state when erected, of what material constructed, and value of same, as of January 1, of the calendar year for which this return is rendered), and (*b*) what percentage of depreciation is claimed.

35. Amount allowed to cover depletion, in case of mines and oil wells, not to exceed 5 per cent of the gross value at the mine or well of the output for the calendar year for which this return is rendered.....

Wife's deduction.....

NOTE.—State (*a*) cost of mine or well, (*b*) gross value at the mine or well of the output for the calendar year for which this return is rendered, and (*c*) what percentage of depletion is claimed.

36. Total "General Deductions" (to be entered on line 2)..... $ 2 3 5 4 4 88

NOTE.—If space is insufficient for answering any questions, attach a supplemental sheet to this return.

AFFIDAVIT TO BE EXECUTED BY INDIVIDUAL MAKING HIS OWN RETURN.

I swear (or affirm) that the foregoing return, to the best of my knowledge and belief, contains a true and complete statement of all taxable gains, profits, and income received by me during the year for which the return is made, and that I am entitled to all the deductions and exemptions entered or claimed therein under the Federal income tax law of October 3, 1913.

Sworn to and subscribed before me this.....day of....., 191—.

[SEAL]

.....
(Signature of individual.)

.....
.....
(Official capacity.)

EXHIBIT 6 TO AFFIDAVIT—Continued.

AFFIDAVIT TO BE EXECUTED BY DULY AUTHORIZED AGENT MAKING RETURN FOR INDIVIDUAL.

I swear (or affirm) that I have sufficient knowledge of the affairs and property of ..... to enable me to make a full and complete return of the taxable income thereof, and that the foregoing return, to the best of my knowledge and belief, contains a true and complete statement of all the taxable gains, profits, and income received by said individual during the year for which the return is made, and that the said individual is entitled under the Federal income tax law of October 3, 1913, to all the deductions and exemptions entered or claimed therein, and that I am authorized to make this return for the following reasons:

.....

.....

.....

.....

(Signature of agent.)

.....

(Post-office address of agent.)

Sworn to and subscribed before me this .....day of....., 191—.

[SEAL]

.....

.....

(Official capacity.)

INSTRUCTIONS.

1. This return shall be made by every citizen of the United States, whether residing at home or abroad, and by every person residing in the United States, though not a citizen thereof, having a *net income* of $3,000, or over, for the taxable year.

2. This return shall be made by every *nonresident alien* deriving any net income from property owned and business, trade, or profession carried on in the United States by him. No specific exemption is allowed nonresident aliens.

3. When an individual by reason of minority, sickness, or other disability, or absence from the United States, is unable to make his own return, it may be made for him by his *duly authorized* representative.

4. This return should be filed with the collector of internal revenue for the district in which the individual resides. In case the person resides in a foreign country, then with the collector for the district in which his principal business is carried on in the United States.

5. When the return is not filed within the required time by reason of sickness or absence of the individual, an extension of time, not exceeding 30 days from March 1, within which to file such return *may be* granted by the collector, *provided* a written application therefor is made by the individual within the period for which such extension is desired.

6. This return, properly filled out, must be made under oath or affirmation. Affidavits may be made before any officer *authorized by law* to administer oaths.

7. An unmarried individual or married individual not living with husband or wife shall be allowed an exemption of $3,000. When husband and wife live together they shall be allowed jointly a total exemption of only $4,000 on their aggregate income. Either husband or wife may make, sign, and verify a return of their joint income. Where husband and wife have separate incomes they make a joint return of such separate income, both subscribing to the return, or they may make separate returns of their respective incomes, but in no case shall they claim or be allowed more than $4,000 exemption on their aggregate incomes.

8. Amounts charged on line 29 for restoring property or making good the exhaustion thereof from its use in business, together with the amount claimed for depreciation on line 34, must not exceed the deterioration of the property in one year.

c2—7357

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EXHIBIT 7 TO AFFIDAVIT.

Law offices
William A. Glasgow, jr.
1018 Real Estate Trust Building.
Broad & Chestnut Streets.

PHILADELPHIA, *January 22nd, 1918.*

MR. L. F. SPEER,
Deputy Commissioner,
Office of Commissioner of Internal Revenue,
Treasury Department, Washington.

MY DEAR MR. SPEER: Referring to the question of income tax on the issue of securities of the E. I. duPont de Nemours & Company in 1915, which has been the subject of investigation, and about which I have heretofore written you.

I represent Mr. Alfred I. duPont, a stockholder at Wilmington, Del., and several others, and before any attempt is made to assess any stockholders, I think it very important that the commissioner should give us a hearing, especially in view of the case of Towne vs. Eisner, decided by the Supreme Court of the United States on January 7th, and the principles of which I contend govern under the facts of the matter. I therefore earnestly ask that before anything is done, a hearing should be had.

Suggestion was made to me as to preparing a brief of the facts. Representing Mr. Alfred I. duPont, I have no free access to the books of the duPont Company, and I have been trying to get the information upon which to prepare this accurate statement of facts. I have been unable to do so up to the present time, but will hope to do this in the near future.

Very truly,

WAG/G. WM. A. GLASGOW, JR.

90

EXHIBIT 8 TO AFFIDAVIT.

UNITED STATES FOOD ADMINISTRATION,
LAW DEPARTMENT,
Washington, D. C., March 26, 1918.

MR. L. F. SPEER,
Assistant Commissioner of Internal Revenue,
Treasury Department, Washington, D. C.

MY DEAR MR. SPEER: Referring to our conversation last Saturday and to the matter of income tax of Mr. Alfred I. duPont, you directed an inquiry as to whether this matter was not controlled by the case of Towne v. Eisner, and I am hopeful that the conclu-

sion reached will be the one that I have already reached—that the matter is controlled by that case. Will you drop me a line as to your view after you are advised on that subject? And if there is to be a hearing, I want to thank you for having postponed the same until the 15th day of May.

Believe me,

Very sincerely yours,

WM. A. GLASGOW, JR.

WAGJr-g.

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91 EXHIBIT 9 TO AFFIDAVIT.

APRIL 1, 1918.

IT:PA.
JEH.

MR. WILLIAM A. GLASGOW, JR.,
United States Food Administration,
Washington, D. C.

SIR: This office is in receipt of your letter of March 26th, 1918, in which you request an extension of time from April 2, 1918, to May 15, 1918, for the hearing on the income-tax liability of Alfred I. duPont, of Wilmington, Delaware.

In reply you are advised that the question of Mr. duPont's liability is still under investigation, and when the investigation is completed and before final action has been taken this office will notify you, and if a hearing is found necessary your request will be granted.

Respectfully,

Deputy Commissioner.

EB.

MARCH 16, 1918.

IT:PA.
CEK.

MR. WILLIAM A. GLASGOW, JR.
1018 Real Estate Trust Building,
Philadelphia, Pa.

SIR: This office has before it your letter of January 22, 1918, in which you ask to be granted a hearing in the case of Mr. Alfred I. duPont, Wilmington, Delaware, a stockholder of E. I. duPont de Nemours & Company.

A hearing is hereby granted, to be held at 10.30 a. m., Tuesday, April 2, 1918, in room 322 Treasury Building, Washington, D. C.

It will be necessary for you to submit, at least ten days prior
92 to the date of the hearing, a brief containing a complete statement of the facts which you wish to present.

Respectfully,

MBD.

EXHIBIT 10 TO AFFIDAVIT.

UNITED STATES FOOD ADMINISTRATION,
LAW DEPARTMENT,
Washington, D. C., April 24, 1918.

Subject: Alfred I. duPont et al. income tax.

Mr. L. F. SPEER,
Assistant Commissioner of Internal Revenue,
Treasury Department, Washington, D. C.

MY DEAR MR. SPEER: Referring to the above matter, about which I saw you yesterday, Tuesday, morning: I understand the situation to be now, in view of your letter to me of April 1, as confirmed in our conversation, that the "question of Mr. duPont's liability is still under investigation, and when the investigation is completed and before final act'on has been taken" that you will notify me, and "if a hearing is found necessary" my request for a hearing will be granted.

If you could put me in touch with the proper man in your organization to consider this question, I think I have in my possession all of the documentary material which it would be necessary for him to have; and as I am so firm in my conclusion that the matter is entirely governed by the case of Towne v. Eisner, I think I could convince the proper representative of your bureau.

Believe me,

Very truly yours,
WAGJr–g.

WM. A. GLASGOW, JR.

93

APRIL 24, 1918.

IT : PA.
ERF.
INTERNAL REVENUE AGENT,
Baltimore, Maryland.

Referring to your report of November 30, 1917, relative to the investigation which was conducted by Income Tax Inspector D. P. DuRoss of the returns filed by Alfred I. duPont, Wilmington, Delaware, it is desired by this office that the investigation of this case be completed on the earliest date possible.

Please make special the reinvestigation of this case which should be conducted in the light of office letter dated April 1, 1918, which was addressed to you in reference to the matter.

An early report is requested.

Deputy Commissioner.

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
Baltimore, Md., April 1, 1918.

IT—Alfred I. duPont, Wilmington, Del.

COMMISSIONER INTERNAL REVENUE.

I am enclosing transcript for 1916 of Alfred I. duPont, which should have been returned to you in my report of November 30, 1917.

E. A. FORBES,
Internal Revenue Agent.

JMW/H.
Enc.

94 In re Alfred I. duPont, Wilmington, Delaware.

APRIL 21, 1920.

IT : I : FAR : P.
WEL.
MR. WILLIAM A. GLASGOW, JR.,
c/o Alfred I. duPont, Wilmington, Delaware.

SIR: In compliance with your request submitted at a conference held February 2, 1920, in connection with the income tax liability of the above-named taxpayer, that you be informed as to whether a loss would be allowed the taxpayer in 1918 concerning the payment of the dividend in debenture stock of the Delaware Corporation, you are advised as follows:

It is the opinion of this office that the transaction referred to, which took place in January, 1918, is a distribution in final liquidation of the E. I. duPont de Nemours Powder Company. The loss or gain to be reported would be the difference between the market value of the shares of stock of the old corporation on March 1, 1913, and the market value of stock of the new corporation at the time of receipt, plus the cash consideration accepted in exchange for the old stock surrendered.

If the taxpayer elected to receive stock instead of the cash consideration, the loss or gain to be reported would be computed on the basis of the above, plus the value of the stock received in exchange for the old stock surrendered.

You are further advised that the taxpayer should submit a claim for refund, if it is shown that he has suffered a loss in this final liquidation in 1918, or submit an amended return if the facts disclose a profit in the transaction.

Respectfully,

(Signed) G. V. NEWTON.
Deputy Commissioner.

MFD: ELC—2.

95 EXHIBIT 11 TO AFFIDAVIT.

SEPT. 6, 1918.

IT:PA.
JEH.

Mr. ALFRED I. DUPONT, *Wilmington, Del.*

SIR: In order to complete the audit of your income tax return for 1915, you are requested to file a statement in reply to the following questions:

1. The number of shares owned by you and the fair market value per share of the E. I. duPont de Nemours Powder Company stock as of March 1, 1913.

2. Did you purchase any of such stock after March 1, 1913, and what did it cost per share?

3. The fair market value of the E. I. duPont de Nemours and Company stock (the new company) at time said stock was received in exchange for the stock of the old company.

4. The exact date you received your shares of stock in the new company and the manner in which you determined the fair market value of same.

5. The number of shares of stock owned by you in powder company at time of distribution of the new company's stock and the number of shares of new stock received in exchange for the old.

An early reply will be appreciated.

Respectfully,

Acting Deputy Commissioner.

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96 EXHIBIT 12 TO AFFIDAVIT.

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
Baltimore, Md., July 30, 1919.

IT:Alfred I. duPont, Wilmington, Del.
Dist. Md., 1913–1917.
Reinvestigation 1915.

COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

Under date of the 22d inst., Internal Revenue Agents Jos. N. Benners and D. P. DuRoss reported as follows:

"In accordance with ruling of department regarding the 200% distribution made during the year 1915 by E. I. duPont de Nemours & Co., we have reinvestigated 1915 return of the above-named individual, including herein profit from the said distribution. Also extended the investigation to cover the year 1917. For 1913, 1914, and 1916, see original report.

Additional tax disclosed.

1915.	Original report	$2,042.07
1915.	Supplemental report	1,361,500.35
	Total	$1,363,542.42
1917		1,414.05
	Total	$1,364,956.47

1915 (further revised).

INCOME.

		A.	B.
	Salaries	$11,000.00	$4,000.00
	Rents		17.80
	Interest notes		9,444.77
97	Interest bonds		28,612.85
	Other sources		19,450,005.00
	Totals	$11,000.00	$19,492,080.42
	Aggregate totals A and B		$19,503,080.42
	Dividends		3,261,842.79
	Total gross income		$22,764,923.21

DEDUCTIONS.

Interest	$9,905.56	
Taxes	13,639.32	
		$23,544.88
Net income		$22,741,378.33
Dividends	$3,261,842.79	
Source	11,000.00	
Specific exemption	4,000.00	
		3,276,842.79
Income subject to normal tax		$19,464,535.54
Normal tax 1%		$194,645.36
Surtax $30,000.00 at 1%		300.00
" 25,000.00 at 2%		500.00
" 25,000.00 at 3%		750.00
" 150,000.00 at 4%		6,000.00
" 250,000.00 at 5%		12,500.00
" 22,241,378.33 at 6%		1,334,482.70
Total tax liability		$1,549,178.06
Tax paid		185,635.64
		1,363,542.42
Additional tax original report		2,042.07
Additional tax		$1,361,500.35

98 Source of additional tax:

Salaries $11,000.00 and $4,000.00, column A and B, respectively, received from E. I. duPont de Nemours Co., Wilmington, Del. Amount in (A) representing amount in excess of exemption claimed.

Interest on bonds $28,612.85 correct and properly belongs in col. (B), exemption having been claimed on the whole amount.

Other sources, original report, none, revised report $19,450,005.00 which represents profit from the 200% distribution, made during October, consisting of two shares common stock of this company for each share held in the E. I. duPont de Nemours Powder Co.

Following Law Opinion 557, which holds this distribution to be in the nature of a liquidating dividend, the additional taxable income is determined as follows:

Shares of E. I. duPont de Nemours Powder Co. held:		
March 1, 1913		37,767
Shares acquired subsequently		None.
Shares held October 1, 1915		37,767
Shares of E. I. duPont de Nemours & Co. received during October, 1915		75,534
Value $347.50 per share on 75,534 shares		$26,248,065.00
Fair market value per share of shares held 3/1/13, $180.00 37,767		6,798,060.00
Profit		$19,450,005.00

Amount subject to normal and additional tax from this source.

Dividends $3,214,289.39 reported should be $3,261,842.79, increase $47,553.40, consisting of $40,000.00 cash dividends omitted in error, and $7,553.40 representing understatement of a dividend received in lieu of cash, payable in preferred stock of the Atlas Powder Co. This dividend was originally reported at an estimated value instead of its capitalized value.

99 Deductions correct except taxes; amount originally reported $2,051.54 should be $13,639.53, a difference $11,587.78 representing income tax omitted in original return.

Unsigned amended return attached, respondent declining to sign either amended return or waiver.

1917 (revised).

Block D—Gross rents		$1,391.66
" F—Dividends:		
1913	$19,166.67	
1916	$129,073.57	
		4,551,045.65
Total, A to F, inclusive		4,552,437.31
Block H—Interest, bonds	$242,924.75	
" " Foreign	5,000.00	
" " Bonds, etc	22,000.48	
		269,925.23
Total, all sources		$4,822,362.54
Block J—Interest	$7,675.81	
Taxes	5,484.12	
		13,159.93
Block K—Net income		$4,809,202.61
Less contributions		119,396.40
O—Net income		$4,689,806.21
Dividends	$4,551,045.65	
Exemption	2,400.00	
		4,553,445.65

Amount subject to 1917 normal		136,360.56
Less additional exemption		2,000.00
Amount subject to 1916 normal		$134,360.56
1917 normal tax		$2,727.21
1916 " "		2,687.21
100 Total normal tax		$5,414.42
Less tax withheld at source		None.
Balance normal tax		$5,414.42
Surtax, 1917:		
$2,000,000.00	$1,050,300.00	
$2,689,806.21@63%	1,694,577.91	
		2,744,877.91
Total, 1917 rates		$2,750,292.33
Dividends 1916 earnings $129,075.57@13%		16,779.56
Dividends 1913 earnings $19,166.67@6%		1,150.00
Total tax liability		$2,768,221.89
Total tax paid		2,766,807.84
Additional tax		$1,414.05

Sources of additional tax:

Total income from all sources originally overstated 1c. (Block H), Block J.

Interest reported $8,532.35 should be $7,675.81, decrease $856.54, representing amount paid on loans for purchase of 3½% Liberty bonds, disallowed.

Taxes reported $5,703.12 should be $5,484.12, decreased $219.00, representing tax withheld at source on non-tax-free bonds to which taxpayer is entitled to refund from withholding agent.

Contributions reported $120,431.40 should be $119,396.40, difference $1,035.00 representing police pension fund $10.00, Lippincott Relief Ass'n $25.00 (an employees' association), and Aero Club of America $1,000.00, disallowed.

Dividends shown to be received from 1913 and 1916 earnings were supported by letters from the issuing corporations.

101 I therefore recommend that this individual be assessed as follows under the act of September 8, 1916, as amended by the act of October 3, 1917, and under the act of October 3, 1917:

Income tax for 1917	$1,414.05

The amount of additional tax for 1915 is disclosed by carrying out the instructions in your letter of September 21, 1918, subject IT:PA:SC—Francis I. duPont.

In determining the profits alleged to have resulted in 1915 from the distribution of two shares of common stock of E. I. duPont de Nemours & Co., or new company, for each share held in the E. I. duPont de Nemours Powder Co., or old company, the examining officers have taken $180.00 as the fair market value of the old common stock as of March 1, 1913, and $347.50 as the fair market value of the new stock at the time it was distributed. It is my understand-

ing that these amounts were fixed by the advisory board. At any rate, they were given to Mr. DuRoss before he left Washington to resume his work on verification of these returns.

As the taxpayer has declined to sign an amended return or waiver for 1915, I recommend that suit be instituted under the Act of October 3, 1913, for $1,363,542.42.

Amended return for 1915, unsigned, is herewith enclosed.

Copy of this report has been sent to Collector Miles.

T. H. McDANNEL,
Internal Revenue Agent in Charge.

JMW–MWT.
Enc. (1).

EXHIBIT 13 TO AFFIDAVIT.

In re Alfred I. duPont, Wilmington, Delaware.

IT:IA:RAA:P.
JGB–16421808.

DEC. 12, 1919.

INTERNAL REVENUE AGENT IN CHARGE, *Baltimore, Maryland.*

Reference is made to your report dated November 30, 1917,
102 and supplemental reports dated April 19, 1918, and July 30, 1919, covering an investigation by examining officers Joseph N. Benners and D. P. DuRoss, of the income tax liability of the above-named individual, for 1913 to 1917, inclusive, which as audited in this office indicates further taxes for 1913, 1915, 1916, and 1917 and an overpayment for 1914.

The further tax for 1913, $2,584.19, has been assessed.

In accordance with section 252, revenue act of 1918, the overpayment of $978.61 for 1914 has been applied against the further tax for 1915, $1,576,994.47, and the balance, $1,576,015.86, together with the further tax for 1916, $442.00, and for 1917, $1,235.71, a total of $1,577,693.57 will be assessed on the next list furnished the collector of internal revenue for the district of Delaware.

The audit in this office discloses an overpayment for 1914 of $978.61, due to allowing credit for the tax paid at source in excess of the correct normal tax liability.

The difference in the tax due for 1915 as shown by your supplemental report dated July 30, 1919, and that stated above, is due to treating as income the dividend of 75,534 shares of stock of E. I. duPont de Nemours and Company, received by the taxpayer by reason of his ownership of 37,767 shares of the stock of the E. I. duPont de Nemours Powder Company. The value of this stock as of date of receipt was $347.50 per share as determined from facts submitted to this office.

Previous office holdings in the case are superseded by the above, which is based on a more complete statement of facts than was available when the earlier conclusions were reached.

The item of taxes paid within the year as shown by the examining officers' report is reduced $978.61, due to the overpayment of tax for 1914 of a like amount.

These adjustments result in increasing the further tax as recommended by the examining officers from $1,361,500.35 to $1,576,994.47.

103 The excess of the wife's dividends over the normal taxable income for 1917, $4,458.71, has been applied against the husband's net income before computing the normal tax, which results in a further tax of $1,235.71 instead of $1,414.05, as recommended by the examining officer.

The taxpayer should be advised of the result of the office audit.

A copy of this letter will be furnished the collector of internal revenue for the district of Delaware.

Acting Assistant to the Commissioner.

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104 EXHIBIT 14 TO AFFIDAVIT.

JANUARY 1, 1920.

Alfred I. duPont, Wilmington, Delaware.

Mr. H. T. GRAHAM,

Collector of Internal Revenue, Wilmington, Del.

DEAR SIR: I am returning herewith your statement of December 31, 1919, wherein you demand payment of income tax which you claim to be due on account of income received by me during the year 1915.

I beg to call your attention to the following basic facts: That income tax assessed on income received during the year 1915 is assessed under the act of October 3, 1913, which act specially provides as follows: That assessments under the law are limited to "any time within three months after said return is due."

I will ask you to note that inasmuch as my return for income tax received during the year 1915 was due and was filed on or before March 15, 1916, that the limit of time in which assessment could have been made expired March 15, 1919, and that, therefore, under the act of October 3, 1913, no further assessment on income received during the year 1915 can be made subsequent to that date. Therefore, your demand for payment at this time is improper and illegal.

Yours truly,

ALFRED I. DUPONT.

EXHIBIT 15 TO AFFIDAVIT.

TAXPAYERS CONFERENCE.

Taxpayer: Alfred I. duPont.
Address: Wilmington, Delaware.
Represented by: Wm. A. Glasgow, jr.
Matter presented: Request for basis of the computation of the tax assessed in his 1915 return in connection with two hundred

105 per cent dividend received by the stockholders of the E. I. duPont de Nemours Powder Company.

Could the taxpayer claim a loss on the sale of the stock received from this dividend based on the value at which it was included in his return as income and the sale price in the year in which the stock was sold?

Further, could the taxpayer claim a loss on the old stock of the E. I. duPont de Nemours Powder Company based on its March 1st value and a value received in the final liquidation of this corporation in January, 1918?

Could the taxpayer postpone the filing of his claim for the abatement of this additional tax until a decision had been reached by the courts of Pennsylvania in the case of Philip F. duPont?

The assessment of the tax was based on a decision of the department holding that the dividend received by this taxpayer from the E. I. duPont de Nemours Powder Company was a dividend in property of another corporation and taxable to the recipient at the fair market value of the stock on the date of receipt, which value has been determined to be $347.50 per share.

Under the provisions of the revenue act of 1918 and article 141, regulations 45, the taxpayer is permitted to claim a loss in transactions entered into for profit; therefore, any loss sustained by him in the sale of this stock would be allowable under the present act.

Concerning the loss to be allowed, if any, on the final liquidation of the E. I. duPont de Nemours Powder Company in January, 1918, Mr. Glasgow was informed that this matter had been submitted for an opinion and that he could expect a definite answer to this question within the next ten days.

Under the provisions of the law there was no authority granted for the postponement of a claim for abatement. He was advised to either pay the tax in accordance with the demand notice sent
106 by the collector or immediately file his claim for abatement as provided in the law.

Interviewed by:

J. G. BRIGHT,
Revenue Agents Audit Sub D.
Mr. LAWDER, *Chief.*
Mr. G. V. NEWTON,
Assistant Head of Unit.

Date: February 2, 1920.
JGB—EMB.

EXHIBIT 16 TO AFFIDAVIT.

CLAIM FOR ABATEMENT.

Taxes erroneously or illegally assessed.

Date of filing to be.

STATE OF .....
County of ..... } *ss:*

IMPORTANT.
This claim should be forwarded to the collector of internal revenue from whom notice of assessment was received.

Collector of internal revenue, income tax division, March 8, 1920, district of Delaware.

Plainly stamped here.

Write name so it can be easily read.

ALFRED I. DUPONT.
(Name of claimant.)

Nemours, Wilmington, Del.
(Address of claimant. Give street and number as well as city or town, and State.)

This deponent, being duly sworn according to law, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to said claim are true and complete:

1. Business engaged in by claimant	Capitalist.
2. Character of assessment or tax	Income tax.
3. Amount of assessment	$1,576,015.86
4. Amount now asked to be abated	$1,576,015.86

107 Deponent verily believes that the amount stated in item 4 should be abated, and claimant now asks and demands abatement of said amount for the following reasons:

I. (a) That the assessment, if any, on which the tax so demanded is based was not made by the Commissioner of Internal Revenue within three years after March 1, 1916, the date on which deponent's return for the year 1915 was due, and that the action of the Commissioner of Internal Revenue in assessing a tax against deponent for the year 1915 after the 1st day of March, 1919, is null and void and of no legal force or effect.

(b) That the power and authority of the Commissioner of Internal Revenue to make an assessment against deponent for the year 1915 under the act of October 3, 1913, entitled "An act to reduce tariff duties and provide revenue for the Government, and for other purposes," expired on the 1st day of March, 1919; that the assessment, if any, on which the tax so demanded is based was made by the Commissioner of Internal Revenue after his legal power so to do had ceased, and that the said assessment and the tax are null and void.

II. (a) That said assessment and tax are based on a stock distribution or dividend made by E. I. duPont de Nemours Powder Company in the year 1915 to its stockholders, of which this deponent was one; that the shares of stock upon which this assessment and

tax are based were not income, taxable or otherwise, for the year 1915, and the assessment based thereon is illegal, null, and void.

(b) That the stock so received by deponent in the year 1915, upon which said assessment and tax was based, was not income of this deponent but was mere evidence of deponent's ownership in property already owned by him, and any assessment or tax thereon is erroneous, illegal, and void. Deponent submits that the rule laid down by the Supreme Court of the United States in the case of Towne vs. Eisner (245 U. S. 418) applies to the stock distribution
108 made by E. I. duPont de Nemours Powder Company in the year 1915, which is the basis of the alleged assessment and tax herein.

Write name so it can be easily read.

(Signed) ALFRED I. DU PONT.

Sworn to and subscribed before me this 8th day of January, 1920.

THOMAS C. CRONKIN,
Notary Public.
(Title.)

(This affidavit may be sworn to before a deputy collector of internal revenue without charge.)

CERTIFICATE OF ASSESSMENT.

I certify that an examination of the records of the commissioner's office shows the following facts as to the assessment and payment of the tax:

Name and address	Character of assessment or article taxed.	Period covered by assessment.	List.	Year.	Month.	Page.	Line.	Amount.

Assessment Clerk, Internal Revenue Bureau.

[Form 47.]

District Delaware.
Ind 1915.
(Nature of tax.)

Abatement Order No. ———.
Claimant, Alfred I. duPont.
Address, Wilmington.

109 Examined and submitted for action, ———, 19—.

Amount claimed, $1,576,051.86.
Amount allowed, $———.
Amount rejected, $1,576,051.86.

Committee on claims:

———
———
———

IT:R:C.
HHH.

Mr. Alfred I. duPont,
Nemours, Wilmington, Delaware.

Sir: Your claim for the abatement of $1,576,015.86, representing an additional assessment of individual income tax for the year 1915, has been examined.

The claim is based upon the statements that the additional assessment was not made within three years after March 1, 1916, the date on which your return for the year 1915 was due; that the act of assessing the tax against you for the year 1915, after March 1, 1919, is null and void; and that the alleged income on which the tax was assessed represented nontaxable stock dividends declared by E. I. duPont de Nemours Powder Company, a corporation organized under the laws of New Jersey.

With regard to the period of limitation for the assessment of additional tax, it is held, under the revenue act of 1913, that if discovery of an omission of income in the preparation of a return is made at any time within three years from the due date of the return, an additional tax may be assessed. Information which established that you were liable for additional tax was on file in this bureau prior to March 1, 1919. Therefore, since the date of discovery and not the date of assessment operates in fulfilling the requirements of the statute, the bureau was within its rights in levying the assessment.

In reference to the taxability of the dividends paid to you
110 by the E. I. duPont de Nemours Powder Company, a corporation organized under the laws of New Jersey, it appears that this was a 200% dividend in stock of the E. I. duPont de Nemours and Company, a corporation organized under the laws of Delaware. It has been held by the United States Supreme Court, in the case of the United States v. C. W. Phellis, decided November 21, 1921, that this dividend constitutes taxable income to the stockholder of the E. I. duPont de Nemours Powder Company.

Therefore no erroneous or excess assessment is disclosed, and your claim is rejected.

Respectfully,

Commissioner.

DE—4.

[Copy.]

JANUARY 1, 1920.

Mr. H. T. GRAHAM,

Collector of Internal Revenue, Wilmington, Del.

DEAR SIR: I am returning herewith your statement of December 31, 1919, wherein you demand payment of income tax which you claim to be due on account of income received by me during the year 1915.

I beg to call your attention to the following basic facts: That income tax assessed on income received during the year 1915 is assessed under the act of October 3, 1913, which act specially provides as follows: That assessments under the law are limited to "any time within three years after said return is due."

I will ask you to note that inasmuch as my return for income tax received during the year 1915 was due and was filed on, or before, March 15, 1916, that the limit of time in which assessment could have been made expired March 15, 1919, and that, therefore, under the act of October 3, 1913, no further assessment on income re-
111 ceived during the year 1915 can be made subsequent to that date. Therefore, your demand for payment at this time is improper and illegal.

Yours truly,

(Signed) ALFRED I. DUPONT.

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
Wilmington, Del., March 8, 1920.

Commissioner of Internal Revenue, Washington, D. C.

Alfred I. duPont.

Replying to your letter of February 2, 1920, file IT:E BKH we are enclosing herewith claim for abatement filed by Alfred I. duPont.

H. T. GRAHAM,
Collector.

REC/RD.

EXHIBIT 17 TO AFFIDAVIT.

MARCH 5, 1920.

IT:Cl. EHB.

Mr. F. S. BRIGHT,

Colorado Building, Washington, D. C.

SIR: Reference is made to your communication of February 16, 1920, relative to the procedure to be employed in definitely estab-

lishing the taxibility of distribution of stock received by certain of your clients in the E. I. duPont de Nemours & Company, a Delaware corporation.

Information is contained therein to the effect that abatement claims have been filed by all of these taxpayers who have thus far been assessed as a result of this stock distribution and that similar claim will be filed by all others who will be hereafter assessed under the same conditions. You state that you have suggested to your clients that one of the claims for abatement be withdrawn, the tax paid under protest, and a claim for refund filed
112 with the department which shall be disposed of as expeditiously as possible; and that after the claim for refund has been denied you will immediately file suit in the Court of Claims in order that you may get a speedy judicial disposition of the case. You ask the cooperation of the bureau to expedite the disposition of the case. You further request that the remaining claims for abatement be permitted to await the decision of the Supreme Court with the understanding that whatever that decision may be the claimant will immediately pay the tax due without suit or legal steps necessary in the collection of the taxes.

In reply, you are informed that if you will indicate the claimant whose case will be used to make a test this office will expedite the handling of the claims for abatement and refund. The bureau, however, can not consistently consent to withhold the collection of the tax of the other claimants in the interim. To adopt such a procedure in these and similar cases would have the effect of indefinitely suspending the collection of large amounts of taxes urgently needed by the Government which, in many instances, are ultimately held to have been lawfully and legally assessed.

This office will consent in the instant cases to withhold action on the claims for abatement of your clients provided you furnish a list of the same showing the amounts claimed as being erroneously assessed. You no doubt appreciate the fact that collectors of internal revenue are responsible for the collection of all taxes due and that a claim for abatement acts as a stay for the payment of the taxes only in the event that the collector is satisfied that the interests of the Government are not jeopardized. The Commissioner of Internal Revenue has no authority to instruct a collector to withhold the collection of any taxes assessed. If the collector of internal revenue for the district in which your clients are located require the claimants to file bonds for the payment of the taxes such action will be taken to protect their interests and the Government's interests.

You no doubt understand that if the decision of the Supreme
113 Court is adverse to your client that interest at the rate of one per cent a month will attach to the taxes assessed which have not been paid as a result of a claim for abatement being filed.

Respectfully,

Commissioner.

BUREAU OF INTERNAL REVENUE,
INCOME TAX UNIT, *March 10, 1920.*

Mr. MORMAN: You no doubt are aware that there are two factions of stockholders of the duPont Company. The attached claim is from the members of one faction, who, I think, is willing to pay the taxes but thinks it better to wait until a decision of the court. If we agree to withhold action for claims for abatement of those members of the faction represented by Mr. Bright, the Washington attorney, I think the same courtesy should be extended to the other faction. The claim herewith has been forwarded from the collector for the district of Delaware. He was told in office letter that he could accept the claim and not to enforce the payment if he was of the opinion that the Government's interests were fully protected. If any action is taken upon this claim please specifically advise me.

G. M.

R. J. BRIGHT
F. S. BRIGHT
H. HINRICHS
Attorneys at Law
Colorado Building
Washington, D. C.

R. R. BRIGHT

FEBRUARY 16, 1920.

Hon. COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

SIR: I represent most of the stockholders of the duPont Powder Co., a New Jersey corporation, who, in 1915, each received for each share of stock of the New Jersey company held by him two shares of the stock of E. I. duPont de Nemours & Co., a Delaware corporation organized to take over the assets of the duPont Powder Co., the New Jersey corporation.

Recently several of these stockholders have received assess-
114 ments in which this distribution of stock has been treated as a property dividend and the assessments have been paid in spite of the fact that more than three years, as limited by the statute in which assessments can be made, had previously elapsed.

There has been much discussion as to whether this distribution in 1915 was a property dividend or a stock dividend, and as such covered by the decision in the Towne case.

Claims for abatement have been filed by all the stockholders whom I represent, to whom assessments have been sent, and additional claims will be filed for the others against whom assessments are laid.

In behalf of my clients I am suggesting that for one of them claim for abatement be withdrawn, tax paid under protest, and claim for refund filed with the department, which shall be as expeditiously disposed of as possible, assuming that in disposing of the claim for refund the lines already set out by the Government, treating this distribution of stock as a dividend of property will be followed, and as soon as this claim for refund has been denied, in behalf of the individual who is to be representative of all my clients, I will immedi-

ately file suit in the Court of Claims so that we will get as speedy a judicial disposition of the case as possible.

In doing this I would ask the cooperation of the bureau to expedite the disposition of the case, first by the Court of Claims, and then to get the Solicitor General to join with me in a motion in the Supreme Court to advance the case so that we can get a full determination of the question.

I am directed by my clients to say that if this course can be pursued and the claimants for abatement are permitted to await the decision of the Supreme Court, they will abide by that decision, whatever it may be, and pay whatever tax is due by them, following the decision of the court, without its being necessary for suit or other legal steps being taken to collect the taxes.

Respectfully,

F. S. BRIGHT.

FSB—F.

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115 EXHIBIT 18 TO AFFIDAVIT.

Court of Claims of the United States. No. 34554.

(Decided March 14, 1921.)

Charles W. Phellis v. the United States.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

Plaintiff, Charles W. Phellis, a citizen of the United States, and a resident of the city of Wilmington, State of Delaware.

II.

On and prior to September 1, 1915, the plaintiff was the owner of 250 shares of the common stock of the E. I. duPont de Nemours Powder Co., a corporation organized and existing under the laws of the State of New Jersey, hereinafter called the New Jersey Corporation.

III.

On the 19th day of August, 1915, the following letter was sent to the stockholders of the said New Jersey Corporation, and the proposal therein made was very shortly thereafter assented to by 89.7 per cent of the holders of the stock of said company.

WILMINGTON, DELAWARE, *August 19th, 1915.*

To the Stockholders of E. I. duPont de Nemours Powder Company:

The business of our company has greatly increased in volume so that it has become necessary to materially increase our capital to pro-

vide for proper and economical operation. Your officers have given the problem long and serious consideration, with the result
116 that the board of directors have approved a plan for the readjustment of its financial affairs, which plan may be briefly summarized as follows:

A new corporation, to be known as E. I. duPont de Nemours & Company, will be incorporated under the laws of the State of Delaware, which company will have three classes of stock, viz, 6 per cent cumulative nonvoting debenture stock, 6 per cent cumulative voting debenture stock, and common stock.

Except as to voting powers, the rights of both voting and nonvoting debenture stocks shall be identical, and the charter will provide:

Debenture shares shall bear cumulative dividends at the rate of 6 per cent per annum.

Debenture shares may be called for payment at $125 per share.

No mortgage or other specific lien may be placed upon the whole or any part of the property of the company without the consent of 75 per cent in amount of the total debenture stock outstanding, except that this provision shall not apply to purchase-money mortgages or to the assumption of mortgages or liens upon property purchased, nor shall it prevent the pledge for the purpose of securing cash to be used in the ordinary course of the business of the company of securities at any time held and owned by the company, provided such cash advances are secured on obligations of the company with maturities not more than three years from date hereof.

In case of dissolution (whether voluntary or involuntary) debenture shares shall have preference over the common stock on distribution of assets to the par amount thereof plus accumulated dividends.

The voting debenture stock shall have equal voting rights with the common stock.

The nonvoting debenture stock shall have no voting privileges except (a) in the event the company shall fail to pay any dividend thereon and such default shall continue for a period of six
117 months, in which event the voting and nonvoting debenture stockholders shall have the sole right of voting to the exclusion of the common-stock holders for the ensuing year and for each year thereafter until the company shall pay all accrued dividends on said debenture stock; and (b) in the event of the net earnings of the company in any calendar year amounting to less than 9 per cent on the amount of debenture stock issued and outstanding during such calendar year, then the nonvoting debenture stockholders shall have equal voting rights with the voting debenture stockholders and with the common-stock holders, which voting rights shall continue until the net earnings of the company for some future calendar year shall equal 9 per cent on the amount of debenture stock issued and outstanding in such future year.

This new corporation, E. I. duPont de Nemours & Company of Delaware, will purchase all the assets and assume all the liabilities

of our company and will pay therefor the sum of $120,000,000, as follows: $1,484,100 in cash; $59,661,700 par value in debenture stock; $58,854,200 par value in common stock. This will be all the stock that will be issued by E. I. duPont de Nemours & Company at this time.

Upon the consummation of said sale and when our company has received the stock of E. I. duPont de Nemours & Company an offer will be made to purchase the outstanding bonds and preferred stock of our company as follows:

(a) 5 per cent bonds (outstanding $1,230,000). This issue will be called for redemption under the provisions of the mortgage and paid for in cash.

(b) 4½ per cent bonds (outstanding $14,166,000). An offer will be made to purchase these bonds at par, payable in 6 per cent nonvoting debenture stock of E. I. duPont de Nemours & Company at par. Thus, a person holding $1,000 par value 4½ per cent bonds will receive in payment therefor $1,000 par value 6 per cent debenture stock.

118 (c) Preferred stock (outstanding $16,068,600). Our 5 per cent preferred stockholders will be given opportunity to accept either of the following offers:

For each $100 par value of our 5 per cent cumulative preferred stock there will be offered $100 par value 6 per cent cumulative nonvoting debenture stock of E. I. duPont de Nemours & Company. Thus, a person holding one share of preferred stock may exchange it for one share of debenture stock which will result in a 20 per cent increase in annual income; or

For each $100 par value of our 5 per cent cumulative preferred stock there will be offered $83⅓ par value 6 per cent cumulative voting debenture stock of E. I. duPont de Nemours & Company, with the privilege to the holder of this voting debenture stock of exchanging for nonvoting debenture stock at any time prior to April 25th, 1916, receiving therefor $100 par value nonvoting debenture stock for each $83⅓ of voting debenture stock.

(d) Common stock (outstanding $29,427,100). All of the common stock of E. I. duPont de Nemours & Company, of Delaware, will be distributed to the common-stock holders of our company as a dividend. In other words, a person holding one share of common stock in our company will continue to hold it and in addition will receive two shares of the common stock of E. I. duPont de Nemours & Company.

The above plan has been worked out as the result of the most mature deliberation and we are confident that it will appeal to our security holders as most desirable.

We therefore request you to sign the attached form of assent to the carrying out of this plan and return it to us at your earliest convenience, being careful to sign exactly as your name appears on your stock certificate.

Any information in connection with the matters herein referred to will be cheerfully furnished upon request.

Respectfully submitted.

PIERRE S. DUPONT,
President.

119 ASSENT OF STOCKHOLDERS.

(To be signed and returned to P. S. duPont, president.)

Whereas the board of directors of E. I. duPont de Nemours Powder Company have approved a plan for readjusting the financial affairs of that company, which plan may be summarized as follows:

(a) A new corporation to be known as E. I. duPont de Nemours & Company, will be incorporated under the laws of the State of Delaware, which company will have three classes of stock, viz, 6 per cent cumulative voting debenture stock, 6 per cent cumulative nonvoting debenture stock, and common stock. Except as to voting powers, the rights of each class of debenture stock shall be identical and shall be as follows: Cumulative six per cent dividends payable quarterly, with preference upon any distribution of assets to the extent of $100 per share and accumulated dividends in case of dissolution (whether voluntary or involuntary); the nonvoting debenture stock to have voting rights in common with the voting debenture stock, and to the exclusion of the common stock in case the company shall fail to pay any quarterly dividend thereon, and such default shall continue for a period of six months and to have equal voting rights with the voting debenture stock and common stock in case the earnings in any year shall amount to less than nine per cent of the amount of debenture stock issued and outstanding; both classes of debenture stock to be redeemable at any dividend date at $125 per share; no prior lien to be placed upon any of the property of the corporation without the consent of three-fourths of the combined debenture stock, but this shall not apply to current obligations for the procurement of working capital, which obligations shall not run for more than three years from the date thereof;

(b) To sell, assign, convey, and transfer to E. I. duPont de Nemours & Company all the assets of every nature of E. I. duPont de
Nemours Powder Company, subject to all the liabilities of
120 that corporation, including its bonds issues, and subject to any lien or charge securing any of said obligations, all of which obligations shall be assumed by E. I. duPont de Nemours & Company;

In consideration therefor the Delaware Corporation to pay $1,484,100.00 in cash, 588,542 shares of the common stock, and 596,617 shares of the debenture stock of E. I. duPont de Nemours & Company;

(c) The E. I. duPont de Nemours Powder Company to redeem its five per cent bonds at 105 per cent in cash; to offer to the holders of its 4½ per cent debenture bonds ten shares of said nonvoting de-

benture stock for each $1,000 of said bonds; to offer to the holders of its preferred stock at their option either one share of said nonvoting debenture stock for each share of said preferred stock, or $83⅓ par value of said voting debenture stock for each share of said preferred stock, and in case the latter option is exercised will further, at any time prior to April 25th, 1916, exchange any such voting debenture stock for nonvoting debenture stock by giving therefor one share of nonvoting debenture stock for each $83⅓ par value of said voting debenture stock;

And whereas, under the charter of said E. I. duPont de Nemours Powder Company, the written assent of two-thirds in amount of the stockholders of said company is necessary to said sale, conveyance, assignment, and transfer of its property, assets, right, and privileges as an entirety:

Now, therefore, we, the undersigned stockholders of E. I. duPont de Nemours Powder Company, hereby assent, for and on behalf of all the stock in said corporation held by us respectively, to the sale, conveyance, assignment, and transfer of all the property, assets, rights, and privileges of said corporation as an entirety to E. I. duPont de Nemours & Company hereinbefore referred to and for the consideration hereinbefore mentioned; and we further authorize the directors of said corporation to take such steps as may be necessary to carry out the same.

121 This assent, however, shall not become effective until such time as E. I. duPont de Nemours & Company shall have been organized, and the board of directors of said E. I. duPont de Nemours Powder Company shall have passed resolutions authorizing said sale, conveyance, assignment, and transfer, as above provided, for the consideration above mentioned, and further shall have authorized the offers of exchange of the said securities of the said E. I. duPont de Nemours & Company to the 4½ per cent bondholders and the preferred stockholders of said New Jersey corporation, and shall have authorized the redemption of said five per cent bonds of said corporation.

This assent may be executed upon separate forms with the same force and affect as though executed upon one instrument.

_____ _____.

(Sign here.)

In presence of—

_____ _____

Dated the _____ day of August, 1915.

IV.

As a result of said proposal and the assent thereto of said stockholders the plan set out in said proposal was carried out. The E. I. duPont de Nemours & Co., a corporation was organized under the laws of the State of Delaware (hereinafter called the Delaware corporation) and the following agreement between the New Jersey corpo-

ration and the Delaware corporation was entered into on the 16th day of September, 1915:

An agreement made this 16th day of September, A. D. 1915, by and between E. I. duPont de Nemours Powder Company, a corporation organized and existing under the laws of the State of New Jersey, hereinafter called the "vendor," of the first part, and E. I. duPont de Nemours and Company, a corporation organized and existing under the laws of the State of Delaware, hereinafter called the "company," of the second part:

122 Whereas the vendor is the owner of the real, personal, and mixed property hereinafter described, which property the board of directors of the vendor, with the written assent of the holders of more than two-thirds of the capital stock of the vendor issued and outstanding, has offered to sell and convey to this company, as an entirety and as a going concern, for one hundred and twenty million dollars ($120,000,000), payable in cash and in the capital stock of this company as follows: One million four hundred and eighty-four thousand one hundred dollars ($1,484,100) in cash; fifty-eight million eight hundred and fifty-four thousand two hundred dollars ($58,854,200) in the common stock of the company at par, and fifty-nine million six hundred and sixty-one thousand seven hundred dollars ($59,661,700) in debenture stock of the company, of which debenture stock one hundred thousand (100,000) shares or any part thereof shall be voting debenture stock if demanded by the vendor; and

Whereas the company has been duly organized with an authorized capital stock of two hundred and forty million dollars ($240,000,000) divided into one million five hundred thousand (1,500,000) shares of nonvoting debenture stock; one hundred thousand (100,000) shares of voting debenture stock and eight hundred thousand (800,000) shares of common stock of the par value of one hundred dollars ($100) each; and

Whereas the board of directors of the company have ascertained, adjudged, and declared that the real, personal, and mixed property aforesaid are of the fair value of one hundred and twenty million dollars ($120,000,000), and that the acquisition thereof is necessary for the business of the company and to carry out its contemplated objects:

Now, therefore, this agreement witnesseth:

1. The vendor hereby agrees to sell, assign, transfer, and set over to the company, its successors and assigns, all its right, title, and interest in and to the following described property, to wit: All of the vendor's real, personal, and mixed property of every kind, nature, and description on the date of transfer and where-
123 soever situate, including water rights and all fixtures and appurtenances to real estate and easements therein; all manufacturing plants and machinery, tools, and appliances used in connection therewith; all raw materials, manufactured product, and

partially manufactured product wheresoever situated; all accounts and bills receivable; all stocks and bonds and all claims, demands, judgments, and choses in action of every kind, nature, and description; all patents, applications for patents, trade-marks, trade names, trade secrets, brands, and copyrights; all cash on hand and moneys in bank and all personal property of every kind, nature, and description.

The above enumeration is not to be taken as excluding any property or property rights not specifically mentioned in the above enumeration, but all the vendor's property, assets, rights, and privileges, including the good will of the business, is intended to be included in said sale. The real, personal, and mixed property above described to be sold and conveyed subject to the lien or charge imposed by that certain indenture made and executed June 1, 1906, between the vendor and the Guaranty Trust Company, of New York, as trustees, to secure the payment of an issue of sixteen million dollars ($16,000,000), par value of four and one-half per cent (4½ per cent) thirty-year gold bonds issued by the vendor, of which issue fourteen million one hundred and sixty-six thousand dollars ($14,166,000) par value are now outstanding and unpaid and subject to any and all other liens, mortgages, charges, or encumbrances of whatsoever kind and nature existing on the date of said sale. The consideration for said sale to be paid by the company shall be one million four hundred and eighty-four thousand one hundred dollars ($1,484,100) in cash; fifty-eight million eight hundred and fifty-four thousand two hundred dollars ($58,854,200) in the common stock of the company at par; and fifty-nine million six hundred and sixty-one thousand seven hundred dollars ($59,661,700) in debenture stock of the company, of which debenture stock one hundred
124 thousand (100,000) shares or any part thereof shall be voting debenture stock if demanded by the vendor; nonvoting debenture stock to be accepted in payment of the purchase price at par and voting debenture stock at one hundred and twenty dollars ($120) per share, with the option in the vendor at any time prior to April 25, 1916, to exchange voting debenture stock for nonvoting debenture stock on the same basis; i. e., the company shall be entitled to receive one hundred shares of nonvoting debenture stock for each eighty-three and one-third shares of voting debenture stock surrendered on or before April 25, 1916. The company shall also, as a part of the consideration for the property and business so sold, assume all the liabilities, debts, and obligations, contractual or otherwise, of every kind, nature, and description, due or to become due, of the vendor existing on the date of said transfer, except capital-stock liability and the funded debt of the vendor, consisting of one million two hundred and thirty thousand dollars ($1,230,000) of the five per cent (5 per cent) first mortgage and collateral trust gold bonds of the vendor now outstanding and unpaid, and fourteen million one hundred and sixty-six thousand dollars ($14,166,000) of

the four and one-half per cent thirty-year gold bonds of the vendor now outstanding and unpaid.

2. The company hereby agrees, in consideration of said sale and upon the execution by the vendor of this agreement and the delivery to it of a good and sufficient bill of sale assigning, transferring, and conveying all of the personal property and personal property rights aforesaid, to pay to the vendor the sum of one million, four hundred and eighty-four thousand, one hundred dollars ($1,484,100) in cash and to issue to the vendor or to such nominees as the vendor shall in writing hereafter direct, at such times and in such amounts as the vendor directs, certificates of stock of the company as follows: Five hundred and eighty-eight thousand, five hundred and forty-two (588,542) shares of the common stock of the company and five hundred and ninety-six thousand, six hundred and seventeen
125 (596,617) shares of the debenture stock of the company, of which debenture stock one hundred thousand (100,000) shares or any part thereof shall be voting debenture stock is demanded by the vendor, said voting debenture stock to be exchanged for non-voting debenture stock at any time prior to April 25, 1916, at the option of the vendor upon the basis of exchange hereinbefore set forth. All shares of the capital stock of the company so issued in payment for the property aforesaid shall be deemed to be and are hereby declared to be full-paid shares and not liable to any further call, and the holders of such stock shall not be liable to any further payment thereon.

The company hereby agrees, as part of the consideration for the sale of the property and business so sold, to assume and discharge all the liabilities, debts, and obligations, contractual or otherwise, of every kind, nature, and description, due or to become due, of the vendor existing on the date of said transfer, except capital-stock liability and the funded debt of the vendor hereinbefore specifically mentioned; and the vendor hereby agrees to hold the company harmless from the lien or charge on the property sold to secure the payment of the funded debt aforesaid.

3. It is agreed that any contract of the vendor existing on the date of said transfer that is not legally assignable without the consent of the other party or parties thereto shall be assigned subject to the assent to such assignment of such other party or parties thereto and, in the event any such other party or parties shall not assent to the assignment of any such contract, the vendor shall perform or cause to be performed the said contract for the use and benefit of E. I. duPont de Nemours and Company and at its sole expense, and all moneys due or thereafter becoming due thereon shall belong to the company.

4 The vendor hereby covenants and agrees with the company, upon the request and at the cost of the company, to execute and to do all such further assurances and things as shall reasonably
126 be required by the company for vesting in it the property and

rights agreed to be hereby sold, and giving to it the full benefit of this agreement.

In witness whereof the parties hereto have caused this agreement to be signed in their respective corporate names by officers duly authorized so to do and their respective corporate seals to be affixed on the day and year first above written.

E. I. DUPONT DE NEMOURS POWDER COMPANY,
By PIERRE S. DUPONT, *President.*

Attest:

L. R. BEARDSLEE, *Asst. Secretary.*
E. I. DUPONT DE NEMOURS AND COMPANY,
By IRENEE DUPONT, *President.*

Attest:

ALEXIS I. DUPONT, *Secretary.*

I, Alexis I. duPont, secretary of E. I. duPont de Nemours and Company, hereby certify that the foregoing is a full and true copy of an agreement between E. I. duPont de Nemours Powder Company and E. I. duPont de Nemours and Company, dated the 16th day of September, 1915, as taken from and compared with the original agreement on record in my possession.

Witness my hand and the seal of the company this 14th day of May, 1920.

[SEAL.] ALEIXIS I. DUPONT.

V.

On October 1, 1915, said New Jersey corporation, by bill of sale, in pursuance of said proposal of August 19, and said agreement of September 16, transferred to the Delaware corporation all its assets every description, said bill of sale reading as follows:

Know all men by these presents:

That E. I. duPont de Nemours Powder Company, a corporation organized and existing under the laws of the State of New Jersey,
of the first part (hereinafter referred to as "vendor"), in
127 consideration of the sum of one million four hundred eighty-
four thousand one hundred dollars ($1,484,100) cash, and other valuable consideration to it in hand paid by E. I. duPont de Nemours and Company, a corporation organized and existing under the laws of the State of Delaware, of the second part (hereinafter referred to as the "vendee"), receipt whereof is hereby acknowledged, has bargained, sold, conveyed, transferred, assigned, and delivered, and by these presents does bargain, sell, convey, transfer, assign, and deliver unto the said vendee all of the vendor's property and assets, and all of the vendor's personal property and personal property rights of whatsoever kind, nature, and description, and wheresoever situate, including the good will of its business, and all its trade-

marks, trade names, trade secrets, brands, and copyrights; and all its machinery, tools, and appliances, in and in connection with its manufacturing plants and otherwise; and all its raw materials, manufactured product and partially manufactured product, wheresoever situate; and all accounts and bills receivable; and all its stocks and bonds; and all its claims, demands, judgments, choses in action, matured or otherwise, of every kind, nature, and description; all its patents and applications for patents; and all cash on hand and money in bank; and also all horses, mules, and live stock of every kind, nature, and description, wheresoever situate; and all transportation fixtures and equipment of every kind, nature, and description including all locomotives, freight cars, tank cars, and track material; and all ships, boats, tugs, barges, and vessels of every kind, nature, and description, and wheresoever, situate, including chartered or rented vessels. The foregoing enumeration is not to be taken as excluding any personal property or personal property rights not specifically mentioned in the above and foregoing enumeration, but all the vendor's personal property, personal assets, and personal rights and privileges is intended to be included in said sale: Provided however, That all the above-described and intended property is sold and conveyed subject
128 to the lien or charge imposed by that certain indenture made and executed June 1, 1906, between the vendor and the Guaranty Trust Company of New York, as trustee, to secure the payment of an issue of sixteen million ($16,000,000) par value of four and one-half per cent (4½ per cent) thirty-year gold bonds issued by the vendor, of which issue fourteen million one hundred sixty-six thousand dollars ($14,166,000) par value are now outstanding and unpaid, and subject to any and all other liens, charges, and encumbrances of whatsoever kind and nature existing on the first day of October, 1915.

To have and to hold all and singular the said property and property rights unto the said vendee, its successors and assigns, absolutely, to its and their own use and behoof forever.

It is understood that any contract of the vendor now existing that is not legally assignable without the consent of the other party or parties thereto is hereby sold and assigned subject to the assent of such other party or parties to such assignment, and in the event that any such other party or parties shall not assent to the sale and assignment of any such contract, the vendor shall and does hereby agree to perform or cause to be performed the said contract for the use and benefit of the vendee, but the sole cost and expense of the vendee, and all moneys due or thereafter becoming due thereon shall belong to said vendee.

The vendee hereby agrees as a part of the consideration for the sale of the property and rights so sold to assume and discharge all the liabilities, debts, and obligations, contractual or otherwise, of every kind, nature, and description, of the vendor, existing on the

first day of October, 1915, whether due or to become due, excepting capital stock and funded debt liability of the vendor.

The vendor hereby agrees to hold the vendee harmless from any lien or charge on the property hereby sold to secure the payment of the said funded debt of the vendee.

The vendor for itself, its successors, and assigns, hereby cove-
129 nants and agrees with the vendee, its successors and assigns, that upon the request but at the cost of the vendee it will execute any and all such further assurances as shall reasonably be required for vesting in the vendee, its successors and assigns, the property and rights hereby sold, and giving to it and them the full benefit of this conveyance.

In witness whereof the parties hereto have caused these presents to be executed in triplicate by their respective officers thereunto duly authorized, and their respective corporate seals to be hereto affixed and attested as of the first day of October, A. D. 1915.

E. I. DUPONT DE NEMOURS POWDER COMPANY.
By PIERRE S. DUPONT, *President.*

Attest:

ALEXIS I. DUPONT, *Secretary.*
E. I. DUPONT DE NEMOURS AND COMPANY,
By H. M. BARKSDLAE, *Vice President.*

Attest:

L. R. BEARDSLEE, *Asst. Secretary.*

I, Alexis I. duPont, secretary of E. I. duPont de Nemours Powder Company, hereby certify that the foregoing is a full and true copy of a bill of sale conveying all of the personal property and personal property rights of E. I. duPont de Nemours Powder Company to E. I. duPont de Nemours and Company, which bill of sale is dated the 1st day of October, 1915, as taken from and compared with the original bill of sale on record in my possession.

Witness my hand and the seal of the company this 14th day of May, 1920.

[SEAL.] ALEXIS I. DUPONT, *Secretary.*

Pursuant to said agreement of September 16, 1915, and upon the execution and delivery of said bill of sale from the New Jersey corporation to the Delaware corporation, and to carry out the terms of said agreement, the Delaware corporation delivered to the New
Jersey corporation 588,342 shares of its common stock of the
130 par value of $100 per share and 596,617 shares of its debenture stock of the par value of $100 per share and of the accepted value of $59,661,700, and said New Jersey corporation retained $1,484,400 in cash with which to redeem its outstanding 5 per cent debenture bonds.

In addition to said debenture stock of said Delaware corporation said New Jersey corporation then held cash in the sum of $1,484,400

fficient to pay its outstanding 5 per cent bonds to the amount of ,230,000. It also held debenture stock of the Delaware corporation exchange for the outstanding preferred stock of the New Jersey rporation to the amount of $16,068,801.34 and to exchange for the utstanding 4½ per cent bonds of said New Jersey corporation to the nount of $14,166,000, and further, said New Jersey corporation held ne debenture stock of the Delaware corporation equal in amount to ne outstanding common stock of the New Jersey corporation, and also held two shares of the common stock of the Delaware corpoation for each share of its, the New Jersey corporation, common tock outstanding.

VII.

Upon the execution of said transfers, in pursuance of said proosal of August 19 and said agreement of September 16, the New ersey corporation distributed as of October 1, 1915, to each holder f its common stock two shares of the common stock of the Delaware orporation, and the original holders of the common stock of the New ersey corporation continued each to hold his original shares of said tock, and as of October 1, 1915, the Delaware corporation took over ll the assets (excepting the aforesaid $1,484,100) theretofore held by he New Jersey corporation, and the New Jersey corporation thereafter held the cash and the debenture stock above described. Plaintiff received his 500 shares of the common stock of the Delaware
131 corporation and continued to hold his original 250 shares of the common stock of the New Jersey corporation.

VIII.

The personnel of stockholders and officers of the two corporations was, on October 1, 1915, identical, the Delaware corporation having elected the same officers as the New Jersey corporation, and said holders of common stock of said corporations had each the same proportionate stock holding in both corporations; that is to say, on October 1 each owner of one share of stock of the New Jersey corporation was also the owner of two shares of stock of the Delaware corporation.

IX.

The New Jersey corporation has received as income upon the debenture stock of the Delaware corporation held by it against its capital stock dividends to the amount of 6 per cent per annum, which it has paid out to its preferred and common stockholders, including plaintiff.

X.

The New Jersey corporation, after the distribution of the stock of the Delaware corporation, continued as a going concern and is still in existence, but, except for the collection and payment of said

dividends and the redemption of its outstanding bonds, and the exchange of debenture stock for its preferred stock and the holding of the debenture stock of the Delaware corporation to an amount equal to the outstanding common stock of the New Jersey corporation, said New Jersey corporation has done no business and is not in process of liquidation.

XI.

The fair market value of the stock of the New Jersey corporation on the 30th day of September, 1915, was $795 per share, and the fair market value of the stock of said New Jersey corporation, after the execution of the contracts between two corporations, was,
132 on October 1, 1915, $100. The fair market value of the stock of the Delaware corporation, distributed as aforesaid, was, on October 1, 1915, $347.50 per share.

XII.

In making his income-tax return for the year 1915 plaintiff, upon the advice of counsel, did not include as income the 500 shares of stock of the Delaware corporation received by him as aforesaid, but attached a statement as to the receipt of said stock to his income-tax return stating he did not regard it as taxable income.

XIII.

After an investigation of his books the Commissioner of Internal Revenue, holding that the 500 shares of stock of the Delaware corporation was income, and that its market value when acquired by claimant, October 1, 1915, was $347.50 per share, assessed an additional tax against claimant upon the 31st day of December, 1919, for income claimed by him to be due from plaintiff for the year 1915 because of the receipt by him of said stock, said assessment being in the sum of $5,657.97. Plaintiff first filed a claim for the abatement of said assessment, but thereafter withdrew his said claim for abatement, and on February 20, 1920, paid to the collector of internal revenue at Wilmington, Del., under protest, the amount of said assessment, to wit, $5,657.97, and upon the same day filed with the collector his claim for refund, which was denied by the Commissioner of Internal Revenue, whereupon plaintiff brought this suit.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that plaintiff is entitled to recover the sum of $5,657.97.

It is therefore adjudged and ordered by the court that the plaintiff recover of and from the United States the sum of five thousand

x hundred and fifty-seven dollars and ninety-seven cents
5,657.97).

OPINION.

33

Booth, Judge, delivered the opinon of the court:

The plaintiff was the owner of 250 shares of the E. I. duPont le Nemours Powder Co., a New Jersey corporation. In September, 915, a complete reorganization of the business of the company took place, and as the result of the same the plaintiff found himself the owner of his original shares in the New Jersey corporation and 500 shares in the new Delaware corporation. The defendants treated he new 500 shares of stock in the Delaware corporation as income, nd assessed against them at their fair market value an income tax of $5,657.97, which plaintiff paid under protest. The facts are in no wise controverted and the findings disclose the exact situation.

In Eisner v. Macomber, 252 U. S. 189, 207, the Supreme Court, speaking of income, said:

"The gain derived from capital, from labor, or from both combined, * * * profit gained through a sale or conversion of capital assets, * * * not a gain accruing to capital, not a growth or increment of value in the investment; but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested or employed, and coming in, being 'derived,' that is, received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal—that is income derived from property. Nothing else answers the description."

Again in the same case the Supreme Court used the following language (p. 206):

"In order, therefore, that the clauses cited from Article I of the Constitution may have proper force and effect, save only as modified by the amendment, and that the latter also may have proper effect,

134 it becomes essential to distinguish between what is and what is not 'income,' as the term is there used; and to apply the distinction, as cases arise, according to truth and substance, without regard to form. Congress can not by any definition it may adopt conclude the matter, since it can not by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised."

Subjecting the facts herein to the rule announced, we find as the admitted status the following situation, viz: On September 30, 1915, the plaintiff's 250 shares in the New Jersey corporation were worth on the market $795 each, or the total sum of $198,750. On October 1, 1915, the day he received his 500 shares additional in the new Delaware corporation, his 250 shares in the New Jersey corporation decreased in value $695 a share, and were then marketable at $100 per share, while the 500 new shares he received were worth in the open market $347.50 each, or a total value of $173,750. Adding this amount to the decreased value of his New Jersey corporation stock,

we find the plaintiff in exactly the same situation as to the value of his holdings in both corporations that he was prior to the reorganization. The figures indisputably demonstrate that by the transaction the plaintiff did not gain or lose a penny, as will with more precision appear from the following tabulation:

Sept. 30, 1915, 250 shares of stock of the New Jersey corporation, at $795 each	$198,750
Total value Oct. 1, 1915	198,750
Oct. 1, 1915, 500 shares of stock of the Delaware corporation at $347.50	173,750
Oct. 1, 1915, 250 shares of stock of the New Jersey corporation, at $100	25,000
Total value of the 750 shares in both	198,750

As a matter of fact if the position of the defendants is to be sustained the plaintiff herein instead of receiving an income
135 from the transaction, loses $5,657.97, which he must pay from gains derived from a source other than the one in controversy, or out of his original investment.

The defendant contends that the New Jersey and Delaware corporations must be regarded as "separate and distinct legal entities" and that the case is within the rule of Peabody v. Eisner, 247 U. S. 347. We think the whole transaction is to be regarded as merely a financial reorganization of the business of the company and that this view is justified by the power and duty of the court to look through the form of the transaction to its substance. In Eisner v. McComber, 252 U. S. 189, at 213, it is said:

"We have no doubt of the power or duty of a court to look through the form of the corporation and determine the question of the stockholder's right, in order to ascertain whether he has received income taxable without apportionment."

It seems incredible that Congress intended to tax as income a business transaction which admittedly produced no gain, no profit, and hence no income. If any income had accrued to the plaintiff by reason of the sale and exchange made it would doubtless be taxable.

Judgment will be awarded the plaintiff in the sum of $5,657.97. It is so ordered.

Graham, judge; Hay, judge; Downey, judge; and Campbell, chief justice, concur.

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136 EXHIBIT 19 TO AFFIDAVIT.

Supreme Court of the United States. No. 260. October Term, 1921.

United States of America, appellant, v. C. W. Phellis.

Appeal from the Court of Claims.

(Nov. 21, 1921.)

Mr. Justice Pitney delivered the opinion of the court:

The court below sustained the claim of C. W. Phellis for a refund of certain moneys paid by him under protest in discharge of an addi-

ional tax assessed against him for the year 1915, based upon alleged income equivalent to market value of 500 shares of stock of a Delaware corporation called the E. I. duPont de Nemours & Co., received by him as a dividend upon his 250 shares of stock of E. I. duPont de Nemours Powder Co., a New Jersey corporation. The United States appeals.

From the findings of the Court of Claims, read in connection with claimant's petition, the following essential facts appear: In and prior to September, 1915, the New Jersey company had been engaged for many years in the business of manufacturing and selling explosives. Its funded debt and its capital stock at par values were as follows:

5% mortgage bonds	$1,230,000
4½% 30-year bonds	14,166,000
Preferred stock ($100 shares)	16,068,600
Common stock ($100 shares)	29,427,100
Total	60,891,700

It had an excess of assets over liabilities showing a large
137 surplus of accumulated profits; the precise amount is not important, except that it should be stated that it was sufficient to cover the dividend distribution presently to be mentioned. In that month a reorganization and financial adjustment of the business was resolved upon and carried into effect with the assent of a sufficient proportion of the stockholders, in which a new corporation was formed under the laws of Delaware with an authorized capital stock of $240,000,000, to consist in part of debenture stock bearing 6 per cent cumulative dividends, in part of common stock; and to this new corporation all the assets and good will of the New Jersey company were transferred as an entirety and as a going concern as of October 1, 1915, at a valuation of $120,000,000, the new company assuming all the obligations of the old except its capital stock and funded debt. In payment of the consideration the old company retained $1,484,100 in cash to be used in redemption of its outstanding 5 per cent mortgage bonds, and received $59,661,700 par value in debenture stock of the new company (of which $30,234,600 was to be used in taking up, share for share and dollar for dollar, the preferred stock of the old company and redeeming its 30-year bonds), and $58,854,200 par value of the common stock of the new company, which was to be and was immediately distributed among the common-stock holders of the old company as a dividend, paying them two shares of the new stock for each share they held in the old company. This plan was carried out by appropriate corporate action; the new company took over all the assets of the old company, and that company, besides paying off its 5 per cent bonds, acquired debenture stock of the new company sufficient to liquidate its 4½ per cent 30-year bonds and retire its
138 preferred stock, additional debenture stock equal in amount at par to its own outstanding common stock, and also two shares of common stock of the Delaware corporation for each share

of the outstanding common stock of the New Jersey corporation. Each holder of the New Jersey company's common stock (including claimant) retained his old stock and besides received a dividend of two shares for one in common stock of the Delaware company, and the New Jersey corporation retained in its treasury 6 per cent debenture stock of the Delaware corporation equivalent to the par value of its own outstanding common stock. The personnel of the stockholders and officers of the two corporations was on October 1, 1915, identical, the new company having elected the same officers as the old; and the holders of common stock in both corporations had the same proportionate stock holding in each. After the reorganization and the distribution of the stock of the Delaware corporation, the New Jersey corporation continued as a going concern, and still exists, but, except for the redemption of its outstanding bonds, the exchange of debenture stock for its preferred stock and the holding of debenture stock to an amount equivalent to its own outstanding common and the collection and disposition of dividends thereon, it has done no business. It is not, however, in process of liquidation. It has received as income upon the Delaware company's debenture stock held by it dividends to the amount of 6 per cent per annum, which it has paid out to its own stockholders, including the claimant. The fair market value of the stock of the New Jersey corporation on September 30, 1915, prior to the reorganization, was $795 per share, and its fair market value, after the execution of the contracts between the two corporations, was on October 1, 1915,
139 $100 per share. The fair market value of the stock of the Delaware corporation distributed as aforesaid was on October 1, 1915, $347.50 per share. The Commissioner of Internal Revenue held that the 500 shares of Delaware company stock acquired by claimant in the distribution was income of the value of $347.50 per share and assessed the additional tax accordingly.

The Court of Claims, observing that from the facts as found claimant's 250 shares of stock in the New Jersey corporation were worth on the market, prior to the transfer and dividend, precisely the same that the same shares plus the Delaware company's shares received by him were worth thereafter, and that he did not gain any increase in the value of his aggregate holdings by the operation, held that the whole transaction was to be regarded as merely a financial reorganization of the business of the company, producing to him no profit and hence no income, and that the distribution was in effect a stock dividend nontaxable as income under the authority of Eisner v. Macomber (252 U. S. 189), and not within the rule of Peabody v. Eisner (247 U. S. 347).

We recognize the importance of regarding matters of substance and disregarding forms in applying the provisions of the sixteenth amendment and income tax laws enacted thereunder. In a number of cases besides these just cited we have under varying conditions followed the rule. Lynch v. Turrish (247 U. S. 221); Southern Pa-

cific Co. v. Lowe (247 U. S. 330); Gulf Oil Corporation v. Lewellyn (248 U. S. 71).

The act under which the tax now in question was imposed (act of Oct. 3, 1913, ch. 16, 38 Stat. 114, 166–167), declares that income shall include, among other things, gains derived "from interest,
140 rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever." Disregarding the slight looseness of construction, we interpret "gains, profits, and income derived from * * * dividends," etc., as meaning not that everything in the form of a dividend must be treated as income, but that income derived in the way of dividends shall be taxed. Hence the inquiry must be whether the shares of stock in the new company received by claimant as a dividend by reason of his ownership of stock in the old company constituted (to apply the tests laid down in Eisner v. Macomber [252 U. S. 189, 207]) a gain derived from capital, not a gain accruing to capital, nor a growth or increment of value in the investment, but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested, and coming in—that is, received or drawn by the claimant for his separate use, benefit, and disposal.

Claimant's capital investment was represented by his New Jersey shares. Whatever increment of value had accrued to them prior to September 30, 1915, by reason of the surplus profits that theretofore had been accumulated by the company was still a part of claimant's capital, from which as yet he had derived no actual and therefore no taxable income so far as the surplus remained undistributed. As yet he had no right to withdraw it or any part of it, could not have such right until action by the company or its proper representatives, and his interest still was but the general property interest of a stockholder in the entire assets, business, and affairs of the company—a capital interest, as we declared in Eisner v. Macomber, supra, (p. 208).

141 Upon the face of things, however, the transfer of the old company's assets to the new company in exchange for the securities issued by the latter, and the distribution of those securities by the old company among its stockholders, changed the former situation materially. The common stock of the new company, after its transfer to the old company and prior to its distribution, constituted assets of the old company which it now held to represent its surplus of accumulated profits—still, however, a common fund in which the individual stockholders of the old company had no separate interest. But when this common stock was distributed among the common-stockholders of the old company as a dividend, then at once—unless the two companies must be regarded as substantially identical—the individual stockholders of the old company, including claimant, received assets of exchangeable and actual value severed from their capital interest in the old company, proceeding from it as the result of a division of former corporate profits, and drawn by them sever-

ally for their individual and separate use and benefit. Such a gain resulting from their ownership of stock in the old company and proceeding from it constituted individual income in the proper sense.

That a comparison of the market value of claimant's share in the New Jersey corporation immediately before, with the aggregate market value of those shares plus the dividend shares immediately after the dividend showed no change in the aggregate—a fact relied upon by the Court of Claims as demonstrating that claimant neither gained nor lost pecuniarily in the transaction—seems to us a circumstance of no particular importance in the present inquiry.

142 Assuming the market values were a precise reflex of intrinsic values, they would show merely that claimant acquired no increase in aggregate wealth through the mere effect of the reorganization and consequent dividend, not that the dividend did not constitute income. There would remain the presumption that the value of the New Jersey shares immediately prior to the transaction reflected the original capital investment plus the accretions which had resulted through the company's business activities and constituted its surplus, a surplus in which until dividend made the individual stockholder had no proper interest except as it increased the valuation of his capital. It is the appropriate function of a dividend to convert a part of a surplus thus accumulated from property of the company into property of the individual stockholders, the stockholder's share being thereby released to and drawn by him as profits or income derived from the company. That the distribution reduces the intrinsic capital value of the shares by an equal amount is a normal and necessary effect of all dividend distributions—whether large or small and whether paid in money or in other divisible assets—but such reduction constitutes the dividend none the less income derived by the stockholder if it represents gains previously acquired by the corporation. Hence, a comparison of aggregate values immediately before with those immediately after the dividend is not a proper test for determining whether individual income, taxable against the stockholder, has been received by means of the dividend.

The possibility of occasional instances of apparent hardship in the incidence of the tax may be conceded. Where, as in this case, the dividend constitutes a distribution of profits accumulated during an extended period and bears a large proportion to the par value

143 of the stock, if an investor happened to buy stock shortly before the dividend, paying a price enhanced by an estimate of the capital plus the surplus of the company, and after distribution of the surplus, with corresponding reduction in the intrinsic and market value of the shares, he were called upon to pay a tax upon the dividend received, it might look in his case like a tax upon his capital. But it is only apparently so. In buying at a price that reflected the accumulated profits, he of course acquired as a part of the valuable rights purchased the prospect of a dividend from the accumulations—bought "dividend on," as the phrase goes—and necessarily took subject to the burden of the income tax proper to

be assessed against him by reason of the dividend if and when made. He simply stepped into the shoes, in this as in other respects, of the stockholder whose shares he acquired, and presumably the prospect of a dividend influenced the price paid, and was discounted by the prospect of an income tax to be paid thereon. In short, the question whether a dividend made out of company profits constitutes income of the stockholder is not affected by antecedent transfers of the stock from hand to hand.

There is more force in the suggestion that, looking through and through the entire transaction out of which the distribution came, it was but a financial reorganization of the business as it stood before, without diminution of the aggregate assets or change in the general corporate objects and purposes, without change of personnel either in officers or stockholders, or change in the proportionate interest of any individual stockholder. The argument, in effect, is that there was no loss of essential identity on the part of the company, only a change of the legal habiliments in which the aggregate cor-
144 porate interests were clothed, no substantial realization by individual stockholders out of the previous accumulation of corporate profits, merely a distribution of additional certificates indicating an increase in the value of their capital holdings. This brings into view the general effect of the combined action of the entire body of stockholders as a mass.

In such matters, what was done, rather than the design and purpose of the participants, should be the test. However, in this case there is no difference. The proposed plan was set out in a written communication from the president of the New Jersey corporation to the stockholders, a written assent signed by about 90 per cent of the stockholders, a written agreement made between the old company and the new, and a bill of sale made by the former to the latter, all of which are in the findings. The plan as thus proposed and adopted, and as carried out, involved the formation of a new corporation to take over the business and the business assets of the old; it was to be and was formed under the laws of a different State, which necessarily imparts a different measure of responsibility to the public, and presumably different rights between stockholders and company and between stockholders inter se, than before. The articles of association of neither company is made to appear, but in favor of the asserted identity between the companies we will assume (contrary to the probabilities) that there was no significant difference here. But the new company was to have authorized capital stock aggregating $240,000,000—nearly four times the aggregate stock issues and funded debt of the old company—of which less than one-half ($118,-
515,900) was to be issued presently to the old company or its
145 stockholders, leaving the future disposition of a majority of the authorized new issues still to be determined. There was no present change of officers or stockholders, but manifestly a continuation of identity in this respect depended upon continued unani-

mous consent or concurrent action of a multitude of individua
stockholders actuated by motives and influences necessarily to som
extent divergent. In the light of all this we can not regard the ne
company as virtually identical with the old, but must treat it as
substantial corporate body with its own separate identity, and it
stockholders as having property rights and interests materially dif
ferent from those incident to ownership of stock in the old company

The findings show that it was intended to be established as such
and that it was so created in fact and in law. There is nothing t
warrant us in treating this separateness as imaginary, unless th
identity of the body of stockholders and the transfer in solido of th
manufacturing business and assets from the old company to the ne
necessarily have that effect. But the identity of stockholders wa
but a temporary condition, subject to change at any moment at th
option of any individual. As to the assets, the very fact of thei
transfer from one company to the other evidenced the actual separat
ness of the two companies.

But, further, it would be erroneous, we think, to test the questio
whether an individual stockholder derived income in the true an
substantial sense through receiving a part in the distribution of th
new shares by regarding alone the general effect of the reorganiza
tion upon the aggregate body of stockholders. The liability of
stockholder to pay an individual income tax must be tested by th
effect of the transaction upon the individual. It was a part
146 the purpose and a necessary result of the plan of reorganiz
tion, as carried out, that common stock of the new company t
the extent of $58,854,200 should be turned over to the old compan
treated by it as assets to be distributed as against its liability
stockholders for accrued surplus, and thereupon distributed to the
"as a dividend." The assent of the stockholders was based upon th
as a part of the plan.

In thus creating the common stock of the new company and tran
ferring it to the old company for distribution pro rata among i
stockholders, the parties were acting in the exercise of their righ
for the very purpose of placing the common-stockholders individual
in possession of new and substantial property rights in esse,
realization of their former contingent right to participate eventual
in the accumulated surplus. No question is made but that the pr
ceedings taken were legally adequate to accomplish the purpose. Th
new common stock became treasury assets of the old company, an
was capable of distribution as the manufacturing assets whose pla
it took were not. Its distribution transferred to the several stoc
holders new individual property rights which they severally were e
titled to retain and enjoy, or to sell and transfer, with precisely th
same substantial benefit to each as if the old company had acquire
the stock by purchase from strangers. According to the findings th
stock thus distributed was marketable. There was neither expre
nor implied condition, arising out of the plan of reorganization

otherwise, to prevent any stockholder from selling it; and he could sell his entire portion or any of it without parting with his capital interest in the parent company or affecting his proportionate
147 relation to the interests of other stockholders. Whether he sold the new stock for money or retained it in preference, in either case when he received it he received as his separate property a part of the accumulated profits of the old company in which previously he had only a potential and contingent interest.

It thus appears that in substance and fact, as well as in appearance, the dividend received by claimant was a gain, a profit, derived from his capital interest in the old company, not in liquidation of the capital but in distribution of accumulated profits of the company; something of exchangeable value produced by and proceeding from his investment therein, severed from it and drawn by him for his separate use. Hence it constituted individual income within the meaning of the income tax law, as clearly as was the case in Peabody v. Eisner (247 U. S. 347).

Judgment of the Court of Claims reversed, and the cause remanded with directions to dismiss the suit.

DISSENTING OPINION.

Mr. Justice McReynolds: In the course of its opinion, citing Eisner v. Macomber (252 U. S. 189, 213), the Court of Claims declared:

"We think the whole transaction is to be regarded as merely a financial reorganization of the business of the company and that this view is justified by the power and duty of the court to look through the form of the transaction to its substance." And, further, "It seems incredible that Congress intended to tax as income a business transaction which admittedly produced no gain, no profit, and hence no income. If any income had accrued to the plaintiff by reason of the sale and exchange made it would doubtless be taxable."
148 There were perfectly good reasons for the reorganization, and the good faith of the parties is not questioned. I assume that the statute was not intended to put an embargo upon legitimate reorganizations when deemed essential for carrying on important enterprises. Eisner v. Macomber was rightly decided, and the principle which I think it announced seems in conflict with the decision just announced.

Mr. Justice Van Devanter concurs in this dissent.

149-150 JANUARY 24, 1920.

IT:IA:RAA:P.

JGB.

Mr. ALFRED I. DUPONT,
Wilmington, Delaware.

SIR: Reference is made to your letter dated January 1, 1920, addressed to the collector of internal revenue, Wilmington, Delaware, wherein you call attention to the fact that the demand for payment of the additional assessment due on your 1915 return is improper

and illegal, the act of October 3, 1913, limiting the assessment to "any time within three years after said return is due."

In reply you are advised that this assessment was made after careful consideration of evidence submitted in the report of the examining officer who examined your books and accounts on or about November 30, 1917, at a time well within the three-year limitation prescribed by paragraph E of the act of October 3, 1913, an abstract of which follows:

"All assessments shall be made * * * on or before the first day of June of each successive year * * * except in cases of refusal or neglect to make such return and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon discovery thereof, at any time within three years after said return is due, * * * and the assessment made * * * shall be paid by such person or persons immeditaely upon notification of the amount of such assessment."

The department holds, in construing the above-quoted provisions of law, that an understatement or omission of income constitutes a false or erroneous return; also that the three-year limitation provided therein is one applying to the time of discovery of tax liability and not to the time of assessing taxes.

151 In the case of additional tax liability on your 1915 income the discovery of the omission of certain dividends received by you during the year 1915 was made on or about November 30, 1917, a date falling within three years from the due date of filing your 1915 return, namely, March 1, 1916.

In view of the above this office is firmly of the opinion that the assessment in question is properly and legally made. Therefore, the demand notice dated January 10, 1920, is returned with the suggestion that you pay the tax as thereon indicated, thereby avoiding the collection of same by the collector of your district through distraint.

A copy of this letter will be furnished to the Collector of Internal Revenue for your district for his guidance and information.

Respectfully,

(Signed) G. V. NEWTON,
Acting Assistant to the Commissioner.

Enclosure:
Tax notice.
E.C.

In United States District Court. Opinion of the court.

(Filed June 13, 1922.)

Upon plaintiff's motion for preliminary injunction and defendant's motion to dismiss bill.

Thompson, J.

From the allegations of the bill and supporting affidavit and the defendant's affidavit, the following facts appear:

On September 30, 1913, the plaintiff was the owner of 37,767 shares of the common stock of the E. I. duPont de Nemours Powder Company, incorporated in 1903 under the laws of New Jersey, hereinafter called the New Jersey Company.

152 On October 1, 1915, the New Jersey Company transferred its assets as an entirety and as a going concern to E. I. duPont de Nemours and Company, incorporated under the laws of Delaware and hereinafter called the Delaware Company.

As part of the plan of reorganization, each stockholder of the New Jersey Company received two shares of the common stock of the Delaware Company for each share of common stock held by him in the New Jersey Company. The plaintiff received, on or about October 1, 1915, a total of 75,554 shares of the common stock of the Delaware Company of the par value of $100 per share.

On February 19, 1916, the plaintiff filed his income tax return under the act of October 3, 1913, and on March 4, 1916, filed an amended return of his income for 1915. The plaintiff did not, however, return nor pay tax upon the said stock dividend as part of his income. The plaintiff believes he attached to his return a statement in writing fully setting forth the entire transaction under which he received the stock and protesting against its inclusion in his income for the year 1915, but the fact that he did attach such statement is neither averred nor proved.

On January 1, 1920, the plaintiff received through the mails a notice and demand dated December 31, 1919, that he pay to the defendant as collector of internal revenue on or before January 10, 1920, the sum of $1,576,015.86 for income tax for the year 1915.

It appears that on November 27, 1917, Income Tax Inspector DuRoss made a report to the revenue agent in charge at Baltimore, Maryland, in which he reported among other things that the plaintiff had received as income, during the year 1915, 200 per cent in common-stock dividends distributed by the E. I. duPont de Nemours Powder Company previously omitted. DuRoss made a further report on July 22, 1919, as a result of which, and of other investigations, the Commissioner of Internal Revenue made an amended return upon such information as provided for by section 2E of the act of October 3, 1913. The evidence clearly shows

153 that this amended return was made not earlier than July 22, 1919, and that the assessment of the additional tax claimed was not made until December, 1919. The plaintiff avers that the defendant intends to proceed to collect the additional taxes referred to in the notice and demand of December 31, 1919, by distress and sale of the plaintiff's lands and freehold in the district of Delaware; that the result would be an irreparable injury to the plaintiff and deprive him of any remedy for contesting the validity of the assessment or the amount thereof; and he prays for an injunction restraining the defendant from distraining or attempting to distrain to collect the sum of $1,576,015.86.

It is claimed that under the provision of section E of the income tax act of 1913 no return could be made by the commissioner after the expiration of three years from March 1, 1916, and no assessment made thereon after the expiration of three years from June 1, 1916. No return or assessment was made within the prescribed time.

Further objections are that the alleged return, not made until July, 1919, or thereafter, was not made by the officials authorized by law, was not made according to the form prescribed, and that the assessment was not based upon the alleged return.

The stock dividend upon which it is attempted to hold the defendant liable has been held by the Supreme Court to be taxable income. U. S. vs. Phellis, 260, October Term, 1921, 42 Sup. Ct. 63. We have therefore a lawful tax upon income for the year 1915, for which the plaintiff should have made return for that year. But the plaintiff contends that the amended return made for him by the commissioner and the assessment thereon were not made according to law, and therefore are invalid, and that no suit or proceeding may now be brought upon such invalid return and assessment.

Section E of the income tax act of 1913, 38 Stat. at Large, 169, after providing for assessment and notice before June 1 of
154 each successive year and that assessment shall be paid on or before June 30, provides that, in case of refusal or neglect to make such return and cases of false or fraudulent returns, the commissioner "shall, upon the discovery thereof, at any time within three years after the return is due, make a return upon information obtained as provided for in this section or by existing law, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such person or persons immediately upon notification of the amount of such assessment.

It is conceded that the plaintiff's return was incorrect and was therefore "false" within the meaning of the section above cited. Woods vs. Lewellyn, 252 Fed. 106; Eliot National Bank vs. Gill, 218 Fed. 600; National Bank of Commerce vs. Allen, 223 Fed. 472.

The plaintiff, therefore, urges that as the return prepared by the commissioner was not made within three years after the plaintiff's return was due on March 1, 1916, and the assessment was not made within three years from June 1, 1916, no suit or proceedings may be begun by the collector for recovery of the tax based thereon. The question as to whether the three years within which a return may be made runs from the time of the discovery or from the time when the return is due has been held against the plaintiff in a dictum in Eliot National Bank vs. Gill, 218 Fed. 600, but the point was not expressly before the court either in that case or in Woods vs. Lewellyn, 252 Fed. 106, where the inference is to the contrary. The subject is discussed in Montgomery's Tax Procedure, ed. 1921, page 170, footnote 18, and the opinion of the author is that the punctuation conveys a very clear meaning that the discovery and

he assessment must be made within three years from the time when he return is due.

These considerations, however, all go to the question of the invalidity of the return and assessment and can not be raised in this proceeding in view of the inhibition of section 3224, R. S., providing

"No suit for the purpose of restraining the assessment or col-
155 lection or any tax shall be maintained in any court," and the rulings of the Supreme Court holding that Congress "has provided a complete system of corrective justice in regard to all taxes imposed by the General Government, including provisions for recovering the tax after it has been paid, by suit against the collector, and therefore the taxpayer has no recourse to the courts until after the money is paid." State Railroad Tax cases, 92 U. S. 575, 613.

Therefore, it must be held that the remedy by injunction will not lie unless because the plaintiff, through the threatened action of the collector to collect through distraint, is deprived of any redress at law, the effect of sec. 3224 upon the facts of this case has been modified by subsequent legislation.

By the revenue act of November 23d, 1921, sec. 250(d), Statutes at Large, page 263, it is provided: "No suit or proceeding for the collection of any such taxes due under this act or under prior income, excess profits, or war tax acts, or of any taxes due under section 38 of such act of August 5, 1909, shall be begun after the expiration of five years after the date when such return was filed," etc.

As the plaintiff's return was filed in March, 1916, I see no escape from the conclusion that the above provisions of the act of 1921 interposes a limitation upon suits or proceedings which expired in 1921. Moreover, sec. 1320 of the act of 1921 provided: "That no suit or proceeding for the collection of any internal revenue tax shall be begun after the expiration of five years from the time such tax was due except in the case of fraud with the intent to evade tax or wilful attempt in any manner to defeat or evade tax. This section shall not apply to suits or proceedings for the collection of taxes under section 250 of this act nor to suits or proceedings begun at the time of the passage of this act."

The latter paragraph of the above section was apparently inserted because section 250 contains its own provisions for limitations
156 of time of making assessments, extension with the consent of the taxpayer, and limitation of time for beginning suits or proceedings.

Under the general system for collection of taxes it would no doubt be held that the plaintiff's remedy would be to pay the tax under protest and bring suit against the collector to recover it back. But the plaintiff argues that, if he should pay the tax to the collector, he would on several grounds be debarred from setting up as a basis of recovery against the collector, either that the return made by the commissioner or the assessment was invalid or that the stock of the Delaware Company received by the plaintiff was assessed in excess

of its fair value for the purpose of determining the tax. To sustain this contention the plaintiff cites section 252 of the revenue act of 1918, reenacted as section 252 of the revenue act of 1921, as follows: "If upon examination of any return of income made pursuant to * * * the act of October 3, 1913, * * * it appears that an amount of income * * * tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income * * * taxes, or instalments thereof then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: Provided, That no such credit or refund shall be allowed or made after five years from the date when the return was due unless before the expiration of such five years a claim therefor is filed by the taxpayer."

As the five years from the date when the return was due, namely, March 1916, has long since expired, the plain meaning of the above section is that no credit or refund could now be lawfully allowed or made because no claim therefor was filed by the plaintiff within the five years. It is evident that Congress intended by the provisions of sec. 250(d) of the act of 1921 to provide a definite five-year limitation for the beginning of suits or proceedings for the collec-
157 tion of taxes enumerated. If the revenue officers should unduly delay the assessment of taxes and the commencement of proceedings for collection, Congress has determined that five years after the due day of the return is a reasonable time to bring to an end the right to collect.

On the other hand, Congress has placed a limitation upon the taxpayer by the provision of sec. 252 of the act of 1921 as to claims for taxes paid in excess of those lawfully due. If the plaintiff pays the amount demanded, no remedy at law is left open to him for the recovery of such excess.

If a suit were begun against the taxpayer after the running of the statute of limitations, he could assert as a defense the various grounds urged in support of the present bill. But if the collector should proceed to seize and sell the plaintiff's property, he would be deprived of any remedy excepting a suit at law against the collector. Meanwhile, his freehold and property would have been subject to seizure and sale and his remedy at law would not adequately repair such injury.

As was said in Ogden City vs. Armstrong, 168 U. S. 224, "In Union Pacific Railway vs. Cheyenne, 113 U. S. 516, 525, this court, through Mr. Justice Bradley said:

"But it is contended that the complainant should have sought a remedy at law and not in equity. It can not be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax, for it must be presumed that the law furnishes a remedy for

illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or to be subjected to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the taxpayer's lands, the
158 loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief."

The language of Mr. Justice Bradley applies aptly to the situation in the instant case. While section 3224 has been strictly construed in view of the remedial system providing for remedies of the taxpayer against the imposition of illegal taxes following Mr. Justice Blatchford's comprehensive discussion of the subject in Snyder v. Marks, 109 U. S. 189, Congress has since added to the system the limitations contained in the act of 1921 and reading these new provisions in connection with section 3224, I can not conceive that Congress intended the taxpayer to be rigidly held to the inhibitions of section 3224 if the effect should be to nullify the inhibitions against the officers of the revenue contained in the later statutes and thus to subject the taxpayer to proceedings by distraint without leaving him an adequate remedy at law, after the limitation had run against the collector's right to begin such proceeding. It would be contrary to equity to hold that, where no remedy is available at law, equity will fail to afford relief.

The views herein expressed are deemed sufficient to support a preliminary injunction without going into a discussion of other contentions raised by the bill. The motion to dismiss is denied.

A preliminary injunction may issue restraining the defendant from proceeding by distraint or attempting to collect by distraint the taxes claimed, without, however, including therein restraint against collection by suit. An appropriate decree may be prepared by counsel.

In United States District Court. Motion to amend bill.

(Filed June 27, 1922.)

Comes now the complainant in the above-named cause and
159 shows to the court that since the said bill was filed, the term of office of Harry T. Graham as United States collector of internal revenue for the district of Delaware has expired, and that John W. Hering has been appointed, and is now exercising the duties of United States collector of internal revenue for the district of Delaware, and therefore complainant moves the court that he may have leave to amend his bill by adding the name of the said John W. Her-

ing, individually and as United States collector of internal revenue for the district of Delaware, and his successor, as defendants thereto, with apt words to charge him and them.

(Sgd.) WM. A. GLASGOW, JR.,
(Sgd.) HENRY P. BROWN,
(Sgd.) ROBERT PENINGTON,
Counsel for Complainant.

In United States District Court. Decree.

(Filed June 27, 1922.)

This cause came on to be heard this 6th day of June, 1922, after having been argued by counsel; and thereupon, it appearing to the court that the term of office of said Harry T. Graham as United States collector of internal revenue for the district of Delaware, has expired, and that John W. Hering has been appointed as, and is now exercising the duties of the office of United States collector of internal revenue for the district of Delaware, it is ordered that the said John W. Hering, individually and as United States collector of internal revenue for the district of Delaware, and his successor in office, be, and he and they are hereby, made parties defendant in this cause;

And the said John W. Hering, individually and as United States collector of internal revenue for the district of Delaware, having appeared as defendant by James H. Hughes, jr., United States attorney, it is further ordered, adjudged and decreed as follows, to wit:

1. That the motion of the defendants to dismiss the plaintiff's bill be, and the same is hereby, overruled.

160 2. That the defendant, Harry T. Graham, individually and as United States collector of internal revenue for the district of Delaware, his agents or representatives, and John W. Hering, individually and as United States collector of internal revenue for the district of Delaware, his agents, representatives, successor or successors, be and they are, and each of them is, hereby enjoined and restrained, until the further order of this court, from proceeding to collect, or attempting to collect, by distraint, the sum of one million, five hundred seventy-six thousand, fifteen dollars and eighty-six cents ($1,576,015.86) or any part thereof, claimed by the defendant against the plaintiff, Alfred I. duPont, by reason of the receipt by him of 75,534 shares of the common stock of the E. I. duPont de Nemours Company on or about October 1, 1915.

3. This injunction, however, shall not operate to prevent a suit by the United States in a court having jurisdiction thereof, to recover from the said Alfred I. duPont any sum or sums of money which the United States may be advised it is entitled to.

(Sgd.) J. W. THOMPSON, J.

In United States District Court. Petition for Appeal.

(Filed July 25, 1922)

To the honorable the Judge of the District Court of the United States for the district of Delaware.

And now, to wit, this 25th day of July, A. D. 1922, comes Harry T. Graham, individually and as United States collector of internal revenue for the district of Delaware, and John W. Hering, individually and as United States collector of internal revenue for the district of Delaware, defendants in the above-entitled cause, by James H. Hughes, jr., Esq., United States attorney for the district of Delaware, their solicitor, and believing themselves aggrieved
161 by the decree of this court entered on the 27th day of June, A. D. 1922, granting a preliminary injunction against them in favor of the plaintiff in the cause, do hereby appeal therefrom to the United States Circuit Court of Appeals for the Third Circuit and pray that this appeal may be allowed and citation granted directed to the above-named plaintiff, Alfred I. duPont, commanding him to appear before the United States Circuit Court of Appeals for the Third Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record and proceedings in said cause, duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit, and in connection with this petition, the Petitioners herewith present their assignments of error.

HARRY T. GRAHAM,
Individually and as United States Collector of Internal Revenue for the District of Delaware,
JOHN W. HERING,
Individually and as United States Collector of Internal Revenue for the District of Delaware,
By JAMES H. HUGHES,
Solicitor.

In United States District Court. Order.

(Filed July 25, 1922.)

And now, to wit, this 25th day of July, A. D. 1922, the defendants to the cause, having filed their petition for an appeal from the decree made and entered herein on the 27th day of June, A. D. 1922:

It is ordered by the court that an appeal be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Third Circuit the said decree.

(Sgd.) J. W. THOMPSON, J.

162 In United States District Court. Assignments of error.

(Filed July 25, 1922.)

And now, to wit, this 25th day of July, A. D. 1922, comes the defendants in the above-entitled cause by James H. Hughes, jr., Esq., their solicitor, and in connection with their appeal, say that in the record and proceedings and in the decree aforesaid, made and entered therein on the 27th day of June, A. D. 1922, there is manifest error to the prejudice of the defendants, and for said error, the said defendants assign the following:

(1) The court erred in overruling defendants' motion to dismiss the bill.

(2) The court erred in granting plaintiff's motion for a preliminary injunction.

(3) The court erred in holding that the plaintiff had no adequate remedy at law.

(4) That court erred in holding that if the plaintiff had paid the tax in response to the assessment and demand his right to recover back the same, if illegally or erroneously assessed and collected, would be barred by sections 250 (d) and 252 of the revenue act approved November 23rd, 1921.

Wherefore, the defendants pray that the said decree be reversed.

HARRY T. GRAHAM,
Individually and as United States Collector of Internal Revenue for the District of Delaware,
JOHN W. HERING,
Individually and as United States Collector of Internal Revenue for the District of Delaware,
By JAMES H. HUGHES,
Solicitor.

163 In United States District Court. Citation and service.

(Filed July 26, 1922.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Alfred I. duPont:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Third Circuit in the city of Philadelphia, State of Pennsylvania, on the 24th day of August, A. D. 1922, pursuant to an appeal duly obtained from an interlocutory decree of the United States for the district of Delaware, wherein Harry T. Graham, individually and as United States collector for the district of Delaware, and John W. Hering, individually and as United States collector of internal revenue for the district of Delaware, are appellants, and you are appellee, and show cause, if any there be, why said decree against the appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. Whitaker Thompson, sitting as judge of the District Court of the United States for the district of Delaware, at Philadelphia, State of Pennsylvania, this 25th day of July, A. D. 1922, and the Independence of the United States of America the one hundred and forty-sixth.

(Sgd.) J. W. THOMPSON,
United States District Judge.

Legal service accepted for Alfred I. duPont, appellee.

(Sgd.) WM. A. GLASGOW, Jr.,
Attorney.

JULY 26, 1922.

164 In United States District Court. Praecipe for transcript.

(Filed September 13, 1922.)

Please prepare and certify transcript of record in the above-entitled cause for filing in the United States Circuit Court of Appeals for the Third Circuit, including therein the following, viz:

1. Docket entries.
2. Bill of complaint with exhibit.
3. Affidavit of Alfred I. duPont.
4. Motion for preliminary injunction and order setting same down for hearing.
5. Motion to dismiss bill.
6. Affidavit of Harry T. Graham, defendant.
7. Exhibits referred to in affidavit of Harry T. Graham, defendant.
8. Opinion of court.
9. Motion to amend bill.
10. Decree.
11. Petition for appeal, order allowing appeal, and assignments of error.
12. Citation.
13. Praecipe for transcript of record.
14. Clerk's certificate.

(Sgd.) JAMES H. HUGHES, Jr.,
Solicitor for Defendants-Appellants.

To H. C. MAHAFFY, Esq.,
Clerk, U. S. District Court.

Service of a copy of the foregoing praecipe accepted this 22d day of August, A. D. 1922.

(Sgd.) WM. A. GLASGOW, Jr.,
Solicitor for Plaintiff-Appellee.

165 In United States District Court. Clerk's certificate.

UNITED STATES OF AMERICA,
District of Delaware, ss:

I, Henry C. Mahaffy, jr., clerk of the District Court of the United States for the District of Delaware, do hereby certify the fore-

going printed pages to be the transcript of record caused to be printed by James H. Hughes, jr., Esq., United States attorney for the district of Delaware and attorney for the defendant, and presented to me by said attorney for certification as such transcript of record in the case of Alfred I. duPont v. Harry T. Graham, individually and as United States collector of internal revenue for the district of Delaware, et al., No. 457, in equity, pending in said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Wilmington, in said district, this twenty-fifth day of October, A. D. 1922.

[SEAL.] (Sgd.) H. C. MAHAFFY, Jr.,
Clerk U. S. District Court, District of Delaware.

166 United States Circuit Court of Appeals for the Third Circuit. No. 2920 (list No. 58). October term, 1922.

(Title omitted.)

Order assigning Bodine, J., to sit with court.

(Filed Dec. 6, 1922.)

Appeal from the District Court of the United States for the district of Delaware.

And now, to wit, this fifth day of December, A. D. 1922, it is ordered that Hon. Joseph L. Bodine, district judge for the district of Delaware, be, and he is hereby, assigned to sit in above case in order to make a full court.

Per curiam.

BUFFINGTON, *Circuit Judge.*

(File endorsement omitted.)

167 *Per curiam opinion.*

(Filed Jan. 3, 1923.)

In the United States Circuit Court of Appeals for the Third Circuit.
No. 2920. October term, 1922.

HARRY T. GRAHAM, INDIVIDUALLY AND AS UNITED STATES collector of internal revenue for the district of Delaware, and John W. Hering, individually and as United States collector of internal revenue for the district of Delaware, and his successor in office, defendants-appellants,

vs.

ALFRED I. DUPONT, PLAINTIFF-APPELLEE.

Appeal from the District Court of the United States for the district of Delaware.

Before Buffington and Davis, circuit judges, and Bodine, district judge.

Per curiam.

In this case the court below granted a preliminary injunction "restraining the defendant from proceeding by distraint or attempting to collect by distraint the taxes claimed, without, however, including therein restraint against collection by suit." Such action by the court was based on reasons stated by it in an opinion printed herewith in the margin.

In declining, as we do, to vacate or modify the order granted by the court below, and in affirming its decree, we base our decision on its opinion which we adopt as expressive of our views.

The decree below is affirmed.

Opinion, Thompson, J. (Omitted. Printed, p. 151.)

168 [Omitted.]

169 [Omitted.]

170 (File endorsement omitted.)

171 In the United States Circuit Court of Appeals for the Third Circuit. No. 2920 (list No. 58). October term, 1922.

(Title omitted.)

Decree.

(Filed Jan. 3, 1923.)

Appeal from the District Court of the United States for the district of Delaware.

This cause came on to be heard on the transcript of record from the District Court of the United States for the district of Delaware, and was argued by counsel.

On consideration whereof, it is nowhere ordered, adjudged, and decreed by this court that the decree of the said District Court in this cause be, and the same is hereby, affirmed.

Philadelphia, January 3, 1922.

Per curiam.

BUFFINGTON, *Circuit Judge.*

(File endorsement omitted.)

172 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct.

I, Saunders Lewis, jr., clerk of the United States Circuit Court of Appeals for the Third Circu't, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in this court in the case of Harry T. Graham et al., appellants, vs. Alfred U. duPont, appellee, No. 2920, on file, and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this seventeenth

day of January, in the year of our Lord one thousand nine hundre
and twenty-three and of the independence of the United States th
one hundred and forty-seventh.

[SEAL.] SAUNDERS LEWIS, Jr.,
Clerk of the U. S. Circuit Court of Appeals,
Third Circuit.

173 *Writ of certiorari and return.*

(Filed Mar. 22, 1923.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable th judges of the United States Circuit Court of Appeals for th Third Circuit, greeting:

Being informed that there is now pending before you a suit i which Harry T. Graham, individually and as United States collecto of internal revenue for the district of Delaware, and John W. Hering individually and as United States collector of internal revenue fo the district of Delaware, and his successor in office, are appellant and Alfred I. duPont is appellee, No. 2920, which suit was remove into the said Circuit Court of Appeals by virtue of an appeal fro the District Court of the United States for the District of Delawar and we, being willing for certain reasons that the said cause and th record and proceedings therein should be certified by the said Circu

Court of Appeals and removed into the Supreme Court of th
174 United States, do hereby command you that you send witho
delay to the said Supreme Court, as aforesaid, the record an proceedings in said cause, so that the said Supreme Court may a thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of th United States, the twelfth day of March, in the year of our Lord on thousand nine hundred and twenty-three.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

175 (File endorsement omitted.)

176 In the United States Circuit Court of Appeals for the Thi Circuit.

(Title omitted.)

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the abov entitled cause that the certified copy of the transcript of the reco now on file in the Supreme Court of the United States shall cons tute the return of the clerk of the United States Circuit Court

Appeals for the Third Circuit to the writ of certiorari granted therein.

JAMES M. BECK,
Solicitor General.
WM. A. GLASGOW, Jr.,
Counsel for Respondent.

MARCH 15, 1923.
Endorsements:
2920.
Stipulation of counsel received & filed, Mar. 21, 1923.
SAUNDERS LEWIS, Jr.,
Clerk.

177 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set.

I, Saunders Lewis, jr., clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original stipulation of counsel to be used as return to writ of certiorari in the case of Harry T. Graham, collector, et al., petitioner, vs. Alfred I. duPont, respondent, on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 21st day of March, in the year of our Lord one thousand nine hundred and twenty-two and of the independence of the United States the one hundred and forty-seventh.

[SEAL.] SAUNDERS LEWIS, Jr.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

178 [Blank.]

179 (File endorsement omitted.)

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1923

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

HARRY T. GRAHAM, INDIVIDUALLY AND AS former Collector of Internal Revenue, et al., Petitioners,
v.
ALFRED I. DUPONT, RESPONDENT.

No. —

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

The Solicitor General of the United States, on behalf of Harry T. Graham, individually and as former collector of United States Internal Revenue for the District of Delaware, John W. Hering, individually and as successor in office of said Harry T. Graham, their deputies and others, prays for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Third Circuit affirming the decree of the District Court of the United States for the District of Delaware granting a preliminary injunction to restrain the collection of a Federal tax.

30705—23

QUESTION INVOLVED.

Can this suit, having for its purpose the restraining of the collection of a Federal tax, be maintained?

STATEMENT OF THE CASE.

This is a suit by Alfred I. duPont, hereinafter referred to as the respondent, against Harry T. Graham et al., hereinafter referred to as the petitioners, to restrain the petitioners from collecting by distraint or otherwise an income tax assessed against the respondent in December, 1919 (on account of income arising and accruing to him during the year 1915), in the sum of $1,576,015.86.

The respondent was one of the stockholders of the E. I. duPont de Nemours Powder Company of New Jersey at the time of the reorganization of said company and the incorporation of the E. I. duPont de Nemours & Company of Delaware, and as such a stockholder he received, on or about October 1, 1915, from the Powder Company of New Jersey 75,534 shares of the common stock of the Delaware Company by reason of his ownership of 37,767 shares of the common stock of the Powder Company of New Jersey—the common stock of the Delaware Company having been distributed as a dividend from surplus to the stockholders of the Powder Company of New Jersey on the basis of two shares of the former for each share of the latter company.

The Commissioner of Internal Revenue held the stock so distributed by the Powder Company of New Jersey to be taxable income for the year 1915 to the

distributees thereof under the Income Tax Act of October 3, 1913 (c. 16, 38 Stat. 114, 167), and determined the fair market value of each share of said stock at the time of distribution on October 1, 1915, to be $347.50. This valuation was sustained by the Court of Claims of the United States in the case of *Phellis* v. *United States*, 56 Ct. Cls. 157. The shares of stock so distributed were held to be taxable income for the year 1915 by this Court in the case of *United States* v. *Phellis*, 257 U. S. 156.

After the decision of this Court in the Phellis case the claim for abatement previously filed by the respondent was rejected by the Commissioner of Internal Revenue, and the collector for the District of Delaware was instructed to collect the aforesaid additional assessment of income tax for the year 1915, amounting to $1,576,015.86, whereupon respondent filed in the District Court of the United States for the District of Delaware a bill in equity praying for relief from the assessment and a motion for a preliminary injunction to restrain the collection of the tax.

The matter came on for hearing March 3, 1922, on the respondent's motion for a preliminary injunction and on the petitioners' motion to dismiss the bill. On June 13, 1922, Honorable J. Whitaker Thompson, sitting as Judge of the United States District Court for the District of Delaware, filed an opinion holding that petitioners' motion to dismiss should be denied and that respondent's motion for

a preliminary injunction should be granted; and on June 27, 1922, an order of the court was filed overruling petitioners' motion to dismiss the bill and granting a preliminary injunction to restrain the petitioners from proceeding to collect or attempting to collect by distraint the sum of $1,576,015.86, or any part thereof, assessed against the respondent by reason of the receipt by him of 75,534 shares of the common stock of the E. I. duPont de Nemours Company on or about October 1, 1915.

An appeal was taken from the foregoing decree of the District Court on July 25, 1922, to the United States Circuit Court of Appeals for the Third Circuit, under Section 129 of the Judicial Code of the United States. The Circuit Court of Appeals on January 3, 1923, by a per curiam opinion affirmed the decree of the District Court.

This petition is for a writ of certiorari to review such action of the Circuit Court of Appeals.

STATUTE INVOLVED.

Section 3224 of the Revised Statutes of the United States provides that—

> No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

REASONS FOR GRANTING THE PETITION.

1. That court erred in sustaining the jurisdiction of the District Court to entertain a suit having for its purpose the restraining of the collection of a Federal tax in view of the express prohibition ef the act of Congress above recited.

2. As hereinafter appears, the construction by that court of section 252 of the Revenue Act of 1921 is in conflict with that of the Circuit Court of Appeals for the Second Circuit in the recently decided case of *Fox* v. *Edwards* (Jan. 30, 1923) and with many decisions of this court hereinafter cited.

3. The question is of great importance not only because of the large amount of money involved but by reason of the fact that it is determinative of a large number of cases pending in the District Courts and before the Commissioner of Internal Revenue, and it vitally affects the right of the United States to collect its revenue by executive process subject to the taxpayer's remedy by suit at law to test his rights after payment under protest.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Third Circuit be granted.

JAMES M. BECK,
Solicitor General.

BRIEF IN SUPPORT OF THE PETITION.

1. The court erred in affirming the decree of the District Court granting a preliminary injunction to restrain the collection of the tax.

(a) A suit having for its purpose the restraining of the collection of a Federal tax can not be maintained in any court.

The obvious purpose—indeed the sole purpose—of the suit in the case at bar was to restrain the collection of a Federal tax which is due and owing to the Government under the decision of the Supreme Court of the United States in the case of *United States* v. *Phellis*, 257 U. S. 156. The statement of such a purpose should have been sufficient to sound the death knell of the complaint. Suits to restrain the collection of taxes are expressly inhibited by Section 3224, Revised Statutes of the United States.

There can be no question in the case at bar that the assessment was of a *tax* for revenue purposes, and that "penalties" such as were considered by the Supreme Court in *Lipke* v. *Lederer*, 42 Sup. Ct. 549, were not involved.

Since the assessment was of a tax for revenue purposes, made and attempted to be enforced by the proper revenue officers of the United States under color of their offices and under color of statutory authority, its collection can not be restrained by injunction. *Snyder* v. *Marks*, 109 U. S. 189; *Dodge* v. *Osborn*, 240 U. S. 118; *Pacific Whaling Company* v. *United States*, 187 U. S. 447; *Bailey, Collector*, v.

George, et al., 42 Sup. Ct. 419; *Page, Collector,* v. *Polk et al.* (C. C. A. 1st Cir.), 281 Fed. 74; *Nichols, Collector,* v. *Gaston et al.* (C. C. A. 1st Cir.), 281 Fed. 67.

Neither the accuracy nor the validity of an assessment of a tax can be determined in a suit for injunction to restrain its collection. Such is unquestionably the law as laid down by this Court in the case of *Snyder* v. *Marks,* 109 U. S. 189, and reaffirmed in *Dodge* v. *Osborn,* 240 U. S. 118, and *Pacific Whaling Company* v. *United States,* 187 U. S. 447. This Court has repeatedly held that the payment of the tax is a necessary condition precedent to the right of a taxpayer to maintain a suit to test its validity. *State Railroad Tax Cases,* 92 U. S. 575, 613; *Cheatham* v. *United States,* 92 U. S. 85, 88; *Bailey, Collector,* v. *George et al.*, 42 Sup. Ct. 419.

The respondent has not paid the tax, and alleges in his bill of complaint that he had not paid it. That payment of the tax is a necessary condition precedent to a right of action to test the validity of the assessment or collection was most recently affirmed by this Court in the case of *Bailey, Collector,* v. *George et al.*, 42 Sup. Ct. 419, in which Mr. Chief Justice Taft, delivering the opinion of the Court, said:

> In spite of their averment, the complainants did not exhaust all their legal remedies. They might have paid the amount assessed under protest and then brought suit against the Collector to recover the amount paid with interest.

But regardless of the inhibition of Section 3224 of the Revised Statutes, the law in this country is, and has ever been, as stated by Mr. Justice Miller in *United States* v. *Pacific Railroad*, 4 Dill. 66, 70:

> There can be no such thing as obstructing and objecting to the payment, as in the case of adjusting the accounts of individuals.

Section 3224 of the Revised Statutes of the United States, while expressly and positively prohibiting suits having for their purpose the restraining of the assessment or collection of Federal taxes, was, after all, but an affirmation and recognition of existing law. *Roback* v. *Taylor*, 4 Int. Rev. Rec. 170; *Page, Collector*, v. *Polk et al.*, 281 Fed. 74.

(b) The assessment of the additional tax by the Commissioner of Internal Revenue was correct and valid.

The fair market value of the stock for the purpose of the assessment was taken at $347.50, as found by the Court of Claims in the case of *Phellis* v. *United States*, 56 Ct. Cls. 157. That the income was taxable was determined by this Court in *United States* v. *Phellis*, 257 U. S. 156. The discovery that the income tax return filed by the respondent for the year 1915 was false, in the sense that it was inaccurate, was discovered within three years after the said return was due. The assessment was therefore valid, in that it was made within the period of limitation prescribed by Par. E of Sec. 2 of the Income Tax Act of October 3, 1913 (38 Stat. 169), under which the tax was assessed. *Woods* v. *Llewellyn*,

252 Fed. 106; *National Bank of Commerce* v. *Allen* (C. C. A., 8th Cir.), 223 Fed. 472, 478; *Penrose* v. *Skinner*, 278 Fed. 284, 286, 287; *Eliot National Bank* v. *Gill*, 210 Fed. 933, 939; affirmed (C. C. A.. 1st Cir.), 218 Fed. 600.

In *Eliot National Bank* v. *Gill*, 218 Fed. 600, the United States Circuit Court of Appeals for the First Circuit, in construing provisions of the Corporation Excise Tax Act of August 5, 1909, similar to those contained in Par. E of Section 2 of the Revenue Act of October 3, 1913, said that (p. 602):

> The Commissioner's discovery of the facts regarding these deductions was made within three years after March 1, 1910, the year wherein the first of the three returns, afterwards found erroneous, namely, that for 1909, was due, and his assessment of the amount of the deductions was made March 1, 1913. In the case of "false or fraudulent" returns, the fifth subdivision of Section 38 of the act gives the Commissioner power "upon the discovery thereof, at any time within three years after said return is due," to make an additional assessment. *We agree with the District Court that this language does not prevent the making of the assessment after, if the discovery has been within the three years.* [Italics ours.]

The assessment was therefore correct and valid, but even if it were incorrect or invalid it could not be attacked by a bill in equity to enjoin its collection.

(c) The respondent has a plain, adequate, and complete remedy at law.

Regardless of the prohibition of Sec. 3224 of the Revised Statutes, a court of equity has no jurisdiction if the respondent has a plain and adequate remedy at law. In the case at bar the remedy at law is not only plain and adequate, but it has been held by this Court to be the exclusive remedy. *State R. R. Tax Cases*, 92 U. S. 575, 613; *Cheatham* v. *United States*, 92 U. S. 85, 88.

The court held, however, that if the complainant pays the tax after five years from the due date thereof he will have no remedy at law to recover back the tax so paid, the position of the court being that the respondent was deprived of his remedy at law to recover back the tax, if collected or paid pursuant to the assessment after five years from the due date of the return, by the provisions of Sections 250 (d) and 252 of the Revenue Act of 1921 (42 Stat. 265, 268), the former containing a five-year limitation upon suits and proceedings for the collection of a tax and the latter containing a five-year limitation (from the due date of the return) upon refunds and credits by the Commissioner, except where claims for refund or credit are filed within such five years. It is apparent, however, from an examination of the opinion of the District Court (adopted by the Circuit Court of Appeals) that neither court considered Section 3228 of the Revised Statutes, as amended by Section 1316 of the Revenue Act of 1921 (42 Stat. 314), allowing

a period of four years after payment of the tax within which to file a claim for refund.

The finding of the court that the respondent would have no remedy to recover back the taxes if wrongfully collected after five years from the due date of the return refuses to recognize the decision of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury December 16, 1922, and published as T. D. No. 3416, which is as follows:

> A claim for credit or refund of an amount of income, war-profits or excess-profits tax, erroneously or illegally collected, may be allowed after five years from the date when the return was due, even though such claim is not filed by the taxpayer until after the expiration of the five years, if such claim is presented to the Commissioner of Internal Revenue within four years next after the payment of the tax.

The foregoing decision expresses the contemporaneous construction of the administrative department charged with the execution of the statute and should not be overruled by the courts without cogent reasons. *United States* v. *Moore*, 95 U. S. 760, 763; *Brown* v. *United States*, 113 U. S. 568.

The construction of Section 252 of the revenue act of 1921 by the District Court, concurred in by the Circuit Court of Appeals, is contrary to the construction of said section by the Circuit Court of Appeals for the Second Circuit in the recently decided case of *Fox* v. *Edwards* (Jan. 30, 1923, unreported), in which it was held, in effect, that Section 252 is not to

be construed as containing a limitation upon the time within which a claim for refund must be filed for the purpose of commencing a suit to recover back taxes paid. The court, Rogers, Circuit Judge, said: "It simply defines the powers and duties of the Commissioner in correcting overpayments which he finds have been made."

2. This Court has power to issue the writ in the case.

That this Court has power, in a case made final in the Circuit Court of Appeals, to issue a writ of certiorari to review a decree of that court on appeal from an interlocutory order of the District Court, was decided in *American Construction Co.* v. *Jacksonville, etc., Railway*, 148 U. S. 372, 385; *The Three Friends*, 166 U. S. 1, 49.

Not only has this Court authority under Section 240 of the Judicial Code to issue a writ of certiorari to review the decree of the Circuit Court of Appeals in this case (*Lau Ow Bew, Petitioner*, 141 U. S. 583, 587, 144 U. S. 47, 58; *Forsyth* v. *Hammond*, 166 U. S. 506, 511), but it also has such authority under Section 262 of the Judicial Code (*In re Chetwood*, 165 U. S. 443; *Whitney* v. *Dick*, 202 U. S. 132; *McClellan* v. *Carland*, 217 U. S. 268, 277).

CONCLUSION.

The questions involved in this case are of great public importance. If the collection of taxes can be restrained, as held by the Circuit Court of Appeals for the Third Circuit in this case, then, until the situa-

tion is corrected by the legislative branch of the government, it will be difficult to collect the revenue due to the United States—indeed it will be impossible, except after months and even years of costly litigation.

A number of cases involving the same questions are pending in the District Courts of the United States and are being held in abeyance pending the final determination of this case. These suits were brought as a result of Judge Thompson's order restraining the collection of the tax in this case; and unless that order is dissolved there is every reason to believe that the District Courts of the United States will soon be flooded with injunction suits to prohibit the collection of Federal taxes.

If the decision of the Circuit Court of Appeals for the Third Circuit correctly construes the Revenue Act of 1921, to the effect that the Commissioner of Internal Revenue has no authority to grant a claim for refund of taxes illegally or erroneously assessed or collected, if paid more than five years after the due date of the return, the claims for refund of many taxpayers otherwise clearly entitled to such refunds must be rejected, and Treasury Decision 3416, hereinbefore quoted, revoked. A decision of the questions involved in this case is necessary to the efficient and orderly administration of the Bureau of Internal Revenue and the collection of internal revenue taxes.

It is therefore respectfully submitted that a writ of certiorari should issue to review the decree of the

Circuit Court of Appeals for the Third Circuit, to the end that it may be reversed and an order of dismissal of the bill of complaint entered by the District Court and the temporary injunction granted by the latter court dissolved.

I am authorized to say that opposing counsel concur in this petition for the allowance of the writ of certiorari.

JAMES M. BECK,
Solicitor General.

FEBRUARY, 1923.

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INDEX.

CASES CITED.

STATUTES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

HARRY T. GRAHAM, INDIVIDUALLY AND AS Former Collector of Internal Revenue, et al., petitioners,
v.
ALFRED I. DU PONT, RESPONDENT.
No. 846.

CERTIORARI TO THE UNITED STATE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS.

STATEMENT OF THE CASE.

This case is before this court on writ of certiorari issued February 26, 1923, to review the *per curiam* decree of the United States Circuit Court of Appeals for the Third Circuit, entered January 3, 1923 (Record, p. 113), which affirmed a decree of the District Court of the United States for the District of Delaware (Record, p. 102). This decree granted a preliminary injunction to restrain the collection by process of distraint of a tax, amounting to $1,576,015.86, on income in the form of capital stock, which stock was held by this court to be taxable income in the case of *United States* v. *Phellis*, 257 U. S. 156.

I.

The Statutes.

The statute barring this suit is R. S. Section 3224, which reads as follows:

> No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

The applicable parts of the Revenue Act of 1921 (42 Stat. 227), as amended by the Act approved March 4, 1923 (Public No. 527), read as follows:

> SEC. 250 * * * (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts,

or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *

SEC. 252. (a) That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act of 1916, as amended, the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits, or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits, or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer, *or unless before the expiration of two years from the time the tax was paid a claim therefor is filed by the taxpayer:* * * *

(Italics show new matter added by amendment of March 4, 1923.)

SEC. 1318. That section 3226 of the Revised Statutes is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, *unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within ninety days after any such disallowance notify the taxpayer thereof by mail.*"

(Italics show new matter added by amendment of March 4, 1923.)

II.

The Facts.

The respondent was one of the stockholders of the E. I. du Pont de Nemours Powder Company of New Jersey at the time of the reorganization of said company and the incorporation of E. I. du Pont de Nemours & Company of Delaware, and as such he received as a dividend on or about October 1, 1915, from the New Jersey Company 75,534 shares of the common stock of the Delaware Company.

The Commissioner of Internal Revenue held the stock so distributed by the New Jersey Company to be taxable income for the year 1915 to the distributees thereof under the Income Tax Act of October 3, 1913 (c. 16, 38 Stat. 114, 167), and determined the fair market value of each share of said stock at the time of distribution on October 1, 1915, to be $347.50. This valuation was sustained by the Court of Claims of the United States in the case of *Phellis* v. *United States*, 56 Ct. Cls. 157. (Record, p. 92.) On appeal, the shares of stock so distributed were held by this court to be taxable income for the year 1915 in the case of *United States* v. *Phellis*, 257 U. S. 156. (Record, p. 94.)

Phellis, like du Pont (the present appellee), was a stockholder of the New Jersey company, and the dividend, which in his case this Court held to be subject to the tax, is the same dividend as to which du Pont is attempting in this suit to enjoin the collection of the tax imposed thereon. Moreover,

the same able and distinguished counsel, who now represents du Pont, argued in behalf of Phellis both in the Court of Claims and in this Court, and his contention as to the invalidity of the tax was then considered and rejected.

Taxpayers have on other occasions tried to enjoin the collection of taxes; but this case is peculiar and extraordinary in the fact that the present plaintiff is seeking to enjoin the collection of a tax, notwithstanding that he can no longer dispute his liability for the tax in some amount. The only possible defense, which may be still open to him after he has paid the tax under protest, is that as the income was in the form of a distribution of stock, such stock may have been overvalued; but if, under R. S. 3224, a Court of equity may not enjoin the collection of the tax, even where a plausible contention is suggested that the tax itself is wholly void as unconstitutional, *a fortiori* a Court should not violate the plain letter of the statute, embodying an important public policy, by enjoining the collection of a tax as to which liability in some amount can no longer be successfully disputed, and the only question is as to the amount thereof.

The plaintiff had received on October 1, 1915, the dividend in question. On February 19, 1916, he filed an income-tax return and on March 4, 1916, a substitute return (both for the year 1915); but he did not include as income the value of the dividend thus received.

On December 31, 1919, the Collector of Internal Revenue demanded of him that he pay the tax which is the subject matter of the present suit, and on January 24, 1920, the demand was renewed and plaintiff was informed that "unless he paid the same, collection would be made thereof by the Collector for the District of Delaware through distraint." Thereupon plaintiff filed a claim in abatement of said tax with the Commissioner of Internal Revenue, and this claim was duly overruled on February 3, 1922. The plaintiff, instead of paying the tax under protest and suing for its recovery, thereupon brought this suit to restrain the Collector of Internal Revenue from distraining, and the Court below, in plain violation of the Act of Congress (R. S. 3224), granted the injunction. Hence this appeal.

The delay in the demand for the additional tax from 1916 until December 31, 1919, was due to the fact, as appears from the affidavit of the Collector of Internal Revenue (Transcript, p. 33), that the Treasury Department did not know of the receipt by the said Du Pont of the taxable income in question until November 30, 1917, when, after an investigation of his tax liability for the years 1913, 1914, and 1915, it developed that the plaintiff

> had received as income during the year 1915 two hundred per cent common stock dividends issued by the E. I. du Pont de Nemours Company, previously omitted.

A further investigation was thereupon ordered, and, upon reports of the investigators, dated April 19, 1918, and July 30, 1919, the Treasury Department reached the conclusion that the said Du Pont, after certain adjustments, was, by reason of the said dividends, further indebted to the Government in the sum of $1,576,015.86, being the tax which is the subject of this suit.

Thereupon, as previously stated, the Collector of Internal Revenue, on December 31, 1919, made formal demand upon Du Pont to pay the additional tax. Thereupon, as previously stated, Du Pont and other stockholders filed a claim in abatement and requested hearings, both as to the validity and the amount of the several taxes. A final decision on these hearings was postponed until this Court could determine the underlying question as to whether the dividend was taxable income—that fact being still challenged by the stockholders—and as soon as this Court, on November 21, 1921, held, in the Phellis Case, that the stock distribution in question was taxable income, the Treasury Department, as previously stated, on February 3, 1922, rejected the claim in abatement and thereby again demanded the payment of the tax. Thereupon the plaintiff, instead of paying the tax under protest and suing for its recovery, brought this suit.

The matter came on for hearing March 3, 1922, on the respondent's motion for a preliminary injunction and on the petitioners' motion to dismiss the bill. On

June 13, 1922, the District Court filed an opinion holding that petitioners' motion to dismiss should be denied and that respondent's motion for a preliminary injunction should be granted (Record, p. 102); and on June 27, 1922, an order of the court was filed overruling petitioners' motion to dismiss the bill and granting a preliminary injunction to restrain the collection by distraint of the tax in question.

An appeal was taken on July 25, 1922, to the United States Circuit Court of Appeals for the Third Circuit, under Section 129 of the Judicial Code of the United States. The Circuit Court of Appeals on January 3, 1923, by a *per curiam* opinion affirmed the decree of the District Court. (Record, p. 112.)

III.

The Question.

CAN THIS SUIT, HAVING FOR ITS PURPOSE THE RESTRAINING OF THE COLLECTION OF A FEDERAL TAX, BE MAINTAINED?

IV.

Assignments of Error.

I. The Court erred in overruling the defendant's motion to dismiss the bill.

II. The Court erred in granting the plaintiff's motion for a preliminary injunction.

III. The Court erred in holding that the plaintiff had no adequate remedy at law.

IV. The Court erred in holding that if the plaintiff had paid the tax in response to the assessment and demand his right to recover back the same, if illegally or erroneously assessed and collected, would be barred by sections 250 (d) and 252 of the revenue act approved November 23, 1921.

Argument.

V.

THE SUIT IN THIS CASE HAS FOR ITS PURPOSE THE RESTRAINING OF THE COLLECTION OF A FEDERAL TAX, AND IT CAN NOT BE MAINTAINED.

That this is a suit for the purpose of restraining the collection of a Federal tax no one can deny.

The only relief prayed for in the bill was injunction to restrain the collection of the tax. (Record, p. 11.) It is true that there was a general prayer for relief, but any relief given under a general prayer must be agreeable to the case made by the bill. *Allen* v. *Pullman's Palace Car Co.*, 139 U. S. 638, 662. In this instance respondent sought a preventive remedy only.

The averments of the bill, showing as they did that the sole purpose of the suit was to restrain the collection of a Federal tax, were sufficient in themselves to have sounded the death knell of the complaint. A suit for such a purpose is directly forbidden by Section 3224 of the Revised Statutes.

The inhibition of Section 3224 of the Revised Statutes was pleaded in the District Court, but that court was of the opinion that if respondent paid the tax in response to the assessment and demand his remedy at law to test the validity of the assessment and collection would have been barred by certain provisions of Sections 250 (d) and 252 of the Revenue Act of 1921, which will be explained later, and that in such a case the provisions of Section 3224 are inapplicable.

The basis of the decree of the District Court, as shown by the opinion of the learned District Judge (Record, p. 102), which opinion was adopted by the Circuit Court of Appeals (Record, p. 112), was that Section 3224 applies only in cases where there is a plain, adequate, and complete remedy at law, and not to cases where the remedy at law is doubtful. Such a view gives no effect whatever to the inhibition of Section 3224 of the Revised Statutes, but considers the question as one of general equity jurisdiction unaffected by Section 3224 of the Revised Statutes, which section is nothing if not a denial of the jurisdiction of courts of equity to interfere with the collection of the revenues of the United States.

If Section 3224 had never been enacted, it is possible that the collection of a Federal tax might be restrained in cases where the remedy at law is doubtful, although from an examination of the cases arising prior to its enactment, it appears that the United States courts were unanimous in holding that the collection of a Federal tax could not be restrained by

injunction, regardless of the absence of any express legislative enactment inhibiting such relief. *Roback* v. *Taylor*, 4 Int. Rev. Rec. 170; *McGee* v. *Denton*, 5 Blatchf. 130, Fed. Cas. 8943; *United States* v. *Pacific R. R.*, 4 Dill. 66, Fed. Cas. 15983.

Since the enactment of Section 3224 of the Revised Statutes (originally Sec. 10, Act of March 2, 1867, c. 169, 14 Stat. 475), the District and Circuit Courts of the United States have had occasion to construe and apply it in many cases. The cases are so numerous that their mere citation would unnecessarily encumber this brief.

It may be said, however, without fear of successful contradiction, that there can not be found in the Federal reports to-day a single decision standing unreversed or unmodified where injunction has been granted to restrain the collection of a Federal tax.

On the other hand, the cases are practically unanimous in holding that *the inhibition of Section 3224 applies to all assessments of taxes made under color of their offices by internal revenue officers charged with general jurisdiction of the subject of assessing taxes.*

"Such," said Mr. Justice Blatchford, speaking the opinion of this court in *Snyder* v. *Marks*, 109 U. S. 189, 193, "has been the current of the decisions in the Circuit Courts of the United States, and we are satisfied it is the correct view of the law." The leading cases in the Circuit Courts up to the date of the decision in the case of *Snyder* v. *Marks* are cited in the opinion of Mr. Justice Blatchford in the latter case.

Since the decision in *Snyder* v. *Marks* this court has had occasion to construe and apply Section 3224 a number of times, but on no occasion has it departed from the sound construction adopted in that case.

Pacific Whaling Co. v. *United States*, 187 U. S. 447.

Corbus v. *Alaska Gold Mining Co.*, 187 U. S. 455.

Dodge v. *Osborn*, 240 U. S. 118.

Dodge v. *Brady*, 240 U. S. 122.

Bailey, Collector, v. *George et al.*, 259 U. S. 16.

This Court will not confuse the case at bar with the recent cases of *Lipke* v. *Lederer*, 42 Sup. Ct. 549, and *Regal Drug Corporation* v. *Wardell*, 43 Sup. Ct. 152, in which the collection of *penalties* under Section 35 of the National Prohibition Act was restrained, or with *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, and *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, which latter cases were suits by stockholders against the corporation in which they held stock, *to restrain the corporation from paying voluntarily* certain income taxes assessed under acts of Congress alleged to have been unconstitutional. In none of said cases was the suit against a collector of internal revenue to restrain the collection of a tax.

Nor does the decision in *Hill* v. *Wallace*, 257 U. S. 310, support this suit, because this Court sustained that case as a stockholders' suit against a corporation to restrain the payment of so-called "taxes," adjudged to be beyond the taxing power under the Constitution, and therefore within the rule laid down

in the *Pollock* and *Brushaber* cases. The Supreme Court held that the statute laying the taxes in the case of *Hill* v. *Wallace* was not a taxing act, but an act to regulate grain exchanges. The exaction was not, therefore, strictly speaking, a "tax," nor had there been any assessment by the Commissioner of Internal Revenue or attempt by the collector of internal revenue to collect an assessment. The effect of the decision was not, therefore, to restrain the collection of a tax.

In the case at bar the assessment is a concededly lawful tax, already sustained as a tax by this Court, and the suit was against the collector to restrain its collection.

The effect of Section 3224 of the Revised Statutes, as construed and applied by this Court, may be summed up as follows: *If the assessment is of a tax for revenue purposes, made and attempted to be enforced by the proper revenue officers of the United States under color of their offices, its collection can not be restrained by injunction.*

Cheatham v. *United States*, 92 U. S. 85.
State R. R. Tax Cases, 92 U. S. 575.
Snyder v. *Marks*, 109 U. S. 189.
Pacific Whaling Company v. *United States*, 187 U. S. 447.
Corbus v. *Alaska Gold Mining Company*, 187 U. S. 455.
Dodge v. *Osborn*, 240 U. S. 118.
Dodge v. *Brady*, 240 U. S. 122.
Bailey, Collector, v. *George, et al.*, 259 U. S. 16.

VI.

Respondent's remedy at law was plain, adequate, and complete, and was not, and is not, barred by any provision of the Revenue Act of 1921, or any other Statute.

There is no equity in the respondent's case, even though his bill of complaint averred no less than five alleged grounds for equitable relief. It requires only a glance at the record to show that if the collection of the tax was barred by the statute of limitations contained in Section 250 (d) of the Revenue Act of 1921, it was not due to any laches on the part of the Government, but to delays created by counsel for the respondent in seeking hearings and abatement of the tax. (Record, pp. 34–39.) Respondent was given every possible opportunity by the Commissioner to show cause why the assessment should not be made. The assessment was withheld a matter of two years in order that he might present facts and arguments against it, and in order that all questions as to the legality of the tax might be determined. (Record, pp. 34–39.)

After the assessment was made no action was taken looking to its collection pending the decision of this Court in the case of *United States* v. *Phellis*, 257 U. S. 156, and even after that decision, sustaining the legality of the tax, the Commissioner gave the respondent ample opportunity to pay without resorting to stringent measures, not judicial, to enforce payment. (Record, p. 38–39.)

The bill of complaint alleged the following grounds for relief:

(1) That the assessment was illegal and invalid in that it was not made within three years after the due date of the return;

(2) That the amount of the assessment was larger than it should have been;

(3) That the assessment constituted a cloud upon respondent's title to his lands;

(4) That the enforcement of the assessment and demand would result in great hardship to respondent; and

(5) That respondent was without adequate remedy at law.

The court below rejected the application for relief by injunction on every ground assigned except the fifth, i. e., that respondent was without adequate remedy at law, holding in accordance with the decisions of this Court that the alleged illegality or inaccuracy of a tax assessment is insufficient ground for restraining its collection. Speaking of the allegations of the bill that the assessment was illegal and incorrect, the learned District Judge said:

> These considerations, however, all go to the question of the invalidity of the return and assessment, and can not be raised in this proceeding, in view of the inhibition of Section 3224, R. S. (Comp. St. Sec. 5947), providing, "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," and the rulings of the Supreme Court holding that Congress "has

> provided a complete system of corrective justice in regard to all taxes imposed by the General Government, including provisions for recovering the tax after it has been paid, by suit against the collector, and therefore the taxpayer has no recourse to the courts until after the money is paid." *State Railroad Tax Cases*, 92 U. S. 575, 613; 23 L. Ed. 663.
>
> Therefore it must be held that the remedy by injunction will not lie, unless, because the plaintiff through the threatened action of the collector to collect through distraint is deprived of any redress at law, the effect of section 3224 upon the facts of this case has been modified by subsequent legislation.
>
> 283 Fed. 300, 303. (Record, p. 105.)

The District Court was clearly right in denying plaintiff's prayer for relief on grounds one to four, cited above, because—

(1) Under authority of *Eliot National Bank* v. *Gill* (C. C. A., 1st Cir.), 210 Fed. 933, 939, and *Penrose* v. *Skinner*, 278 Fed. 284, 286, the assessment was legal; and under the decisions of this Court in *Snyder* v. *Marks*, 109 U. S. 189, and other cases hereinbefore cited, the collection of the tax could not be restrained by injunction even if the assessment was illegal.

(2) The amount of the assessment was correct under the decision of the Court of Claims in the case of *Phellis* v. *United States*, 56 Ct. Cls. 156, and under the decisions of this Court in *Snyder* v. *Marks*, *supra*, and other cases hereinbefore cited, the collection of

the taxes could not be restrained by injunction even if the assessment was incorrect.

(3) Under Section 3224 of the Revised Statutes cloud upon title is insufficient ground for restraining the collection of a tax. *Dodge* v. *Osborn*, 240 U. S. 118.

(4) That the exaction of the tax might result in hardship to the taxpayer is not a valid ground for relief by injunction. *Calkins* v. *Smietanka*, 240 Fed. 138; *Markle* v. *Kirkendall*, 267 Fed. 498.

The reason assigned by the District Court for granting the preliminary injunction was that the tax was more than five years over due, and had respondent paid it he would have had no remedy at law because of (1) the first proviso of Section 252 of the Revenue Act of 1921 "That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer" and (2) the provision of Section 250 (d) of the Revenue Act of 1921 that "no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under Section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed," etc. (Record. pp. 105–106), or, stated plainly, because plaintiff had managed to escape payment for five years, he was excused by a court of equity from paying at all.

The underlying theory of the decision in the court below is summed up in one sentence of the opinion, "It would be contrary to equity to hold that, where no remedy is available at law, equity will fail to afford relief." (Record, p. 107.) Such a view gives no effect whatever to Section 3224 of the Revised Statutes, but attempts to decide the case on general principles of equity. Even if we were compelled to accept such a view as correct, which we do not, we would nevertheless disagree with the conclusion that there was no remedy at law in the case at bar.

VII.

Section 252 of the Revenue Act of 1921 Did not bar Respondent from his remedy at law, and even if it did, the bar has been removed by the Amendment of March 4, 1923. (Public, No. 527.)

It is interesting to note that the court did not say the respondent did not at the time of filing his bill in equity have a plain, adequate, and complete remedy at law. The idea that the court expressed, was that *if the respondent paid the tax* he would then have had no plain, adequate, and complete remedy at law, but the *respondent had not paid the tax when he filed his bill for injunction, and he has never paid the tax.* Consequently, the question of remedy at law or no remedy at law has never fairly arisen.

It is quite true that a taxpayer has no remedy at law or in equity to test the accuracy or validity of a tax assessment *before he pays the tax.* The remedy

is at law and only after payment of the tax. If, after the payment of the tax, his remedy at law is denied him, it is time enough then to appeal to a court of equity. It is the plain intendment of Section 3224 of the Revised Statutes, as construed by this Court, that he can not have any appeal to any court, whether of law or of equity, *until after the payment of the tax.*

> *Bailey, Collector,* v. *George et al.,* 259 U. S. 16.
> *Dodge* v. *Osborn,* 240 U. S. 118.
> *Pacific Whaling Co.* v. *United States,* 187 U. S. 447.
> *Corbus* v. *Alaska Gold Mining Co.,* 187 U. S. 455.
> *Snyder* v. *Marks,* 109 U. S. 189.
> *State R. R. Tax Cases,* 92 U. S. 575.
> *Cheatham* v. *United States,* 92 U. S. 85.

As stated by this Court in *Corbus* v. *Alaska Gold Mining Company,* 187 U. S. 455, 464:

> Not only is it the general rule that equity will not restrain the collection of a tax on the mere ground of its illegality, but also, as appears by its legislation, Congress has attempted to enforce that rule and to require payment of the tax by the party charged therewith before inquiry as to its validity will be permitted. See *Pacific Steam Whaling Company* v. *United States,* ante, p. 447.

And as stated by Chief Justice Taft in the case of *Bailey, Coll'r,* v. *George et al.,* 259 U. S. 16;

> The bill does aver "That these your petitioners have exhausted all legal remedies and

> it is necessary for them to be given equitable relief in the premises": But there are no specific facts set forth sustaining this mere legal conclusion. * * * In spite of their averment, the complainants did not exhaust all their legal remedies. *They might have paid the amount under protest and then brought suit against the Collector to recover the amount paid with interest.* No fact is alleged which would prevent them from availing themselves of this form of remedy. (Italics ours.)

That the court below erred in assuming that "where no remedy is available at law equity will not fail to afford relief," is apparent from the decision of this court in *Pacific Whaling Company* v. *United States*, 187 U. S. 447, 452, in which Mr. Justice Brewer, speaking the opinion of the court, said:

> It is said that unless this application can be sustained the petitioner is without remedy, and that there is no wrong without a remedy. While as a general statement this may be true, it does not follow that it is without exceptions, and especially does *it not follow that such remedy must always be obtainable in the courts. Indeed, as the government can not be sued without its consent, it may happen that the only remedy a party has for a wrong done by one of its officers is an application to the sense of justice of the legislative department.* * * * (Italics ours).

The difference between the decision of the court below in the case at bar and the decision of this Court in *Pacific Whaling Company* v. *United States*,

supra, is that this court gave effect to the provisions of Section 3224 of the Revised Statutes and the court below did not.

Furthermore, it is quite evident that the court below was considering, not whether the taxpayer had a remedy at law *but whether he could successfully pursue his remedy*. While we insist that he had a remedy, we admit that it would be of little value to him for the very palpable reason that his liability to pay a tax on his dividend has already been decided by this Court in the case of *United States* v. *Phellis*, 257 U. S. 156.

The court below held that the first proviso of Section 252 constituted a bar to respondent's remedy at law because more than five years had elapsed since the due date of the income-tax return, and the tax was still unpaid; therefore, if respondent had paid the tax after such five years, he could not have claimed a refund because, under the first proviso of section 252, the Commissioner of Internal Revenue was not authorized to allow a credit or refund after such five years.

The construction of the court below was contrary to the contemporaneous construction of the Department at the time the bill was filed, which was later published in T. D. 3416, approved December 16, 1922, as follows:

> A claim for credit or refund of an amount of income, war-profits, or excess-profits tax, erroneously or illegally collected, may be allowed after five years from the date when

> the return was due, even though such claim is not filed by the taxpayer until after the expiration of the five years, if such claim is presented to the Commissioner of Internal Revenue within four years next after the payment of the tax.

But the previous construction is immaterial now, because by amendment of March 4, 1923 (Public No. 527), Congress has authorized the Commissioner to allow a refund or credit in any case where the claim is filed *within two years after the payment of the tax, even if the payment is more than five years after the due date of the return.* This amendment renders academic the question whether Section 252 of the Revenue Act of 1921 deprived the respondent of his remedy at law.

VIII.

Section 250 (d) of the Revenue Act of 1921 does not bar the collection by distraint after, if the assessment is made before, the expiration of five years after the date when the return was filed.

Section 1320 of the Revenue Act of 1921, cited in the opinion of the court below (Record, p. 105), does not apply to income taxes, and as the tax in the case at bar was an income tax, the court's application of Section 1320 will be ignored. Section 250 (d) (also cited in the opinion) does apply to income taxes and prescribes limitations upon the time within which such taxes can be determined and assessed, as well as upon the time within which suits can

be begun for their collection. It does not, however, prescribe a limitation upon the time within which a tax can be collected by distraint after an assessment is made within the prescribed period. Section 250 (d) provides in part as follows:

> Sec. 250 * * * (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *

It will be noted that the foregoing section prescribes a limitation upon the time within which such taxes must be "determined and assessed," such limitation being four years for taxes due under the 1921 Act and five years for taxes due under prior income tax acts. It also prescribes a limitation of five years upon a "suit or proceeding for the collection of any such taxes."

Section 250 (d) prescribes no limitation whatsoever upon the collection by warrant of distraint after assessment. With regard to taxes due under prior acts, the language of the section is that they "shall be determined and assessed within five years after the return was filed." The court below construed this provision as though it read "shall be determined and assessed *and collected* within five years after the return was filed." Such a construction reads into the Act a limitation not placed there by Congress, i. e., a limitation upon the collection of an assessment by executive process.

Moreover, distraint is not a "proceeding" within the meaning of Section 250 (d) to the effect that "no suit or proceeding for the collection of any such taxes * * * shall be begun, after the expiration of five years after the date when such return was filed." The "proceeding" referred to therein is obviously a judicial proceeding. That a judicial proceeding is referred to is apparent not only from the judicial construction of the term "proceeding," but also from the association of the word "proceeding" with the word "suit." A "proceeding" in its general

acceptation is "an act which is done by the authority or direction of the court—a judicial action or step—32 Cyc. 406. In a more particular sense, any application, however made, to a court of justice for the purpose of having a matter in dispute judicially determined; any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object." 32 Cyc. 406. A proceeding "has reference to something done or to be done in a court of justice." *Hopewell* v. *State*, 22 Ind. App. 489, 54 N. E. 127, 129. Distraint is not a proceeding; it is not judicial, but is purely executive. *Acme Harvesting Machine Co.* v. *Hinkley*, 23 S. D. 509, 513; 122 N. W. 482.

In the case of *Murray's Lessee, et al.*, v. *Hoboken Land & Improvement Co.*, 18 How. 272, the nature of a distress warrant issued by the Solicitor of the Treasury was thoroughly considered in a very able opinion of Mr. Justice Curtis, and it was held that it was an exercise of executive and not of judicial power, according to the meaning of those words in the Constitution.

That Congress did not intend by Section 250 (d) to place a limitation upon the time within which warrants of distraint might issue to collect an assessment is further evident from examination of said section, because, if it had, it would surely have made the period of time within which such warrant must issue different from the period of time within which an assessment must be made, for a warrant

of distraint is dependent absolutely upon an assessment and can not issue without one. The assessment, therefore, must be made before the warrant of distraint can issue, and, if a limitation is to be placed upon collection by distraint, the period within which the warrant of distraint must issue should not begin to run until after the assessment is made.

By Section 250 (d) Congress prescribes a limitation of five years for the determination and assessment of income taxes under the prior statutes referred to therein; but if we say that there is also a five-year limitation upon the time within which a tax can be collected by distraint after assessment, and that such limitation begins to run at the same time that the limitation upon assessments begins to run, then in actual operation and effect there is not a full five-year limitation upon assessments; this for the reason that an assessment is worthless unless followed by distraint to collect the tax, and if the limitation upon distraint is the same as the limitation upon assessments, then assessments made near the end of the five-year period can not be collected, thus, in effect, making the limitation upon assessments less than five years.

The only correct construction is that the limitations contained in Section 250 (d) of the Revenue Act of 1921 are upon assessments and suits, and that the statute no more limits the time for collection by distraint after assessment than it limits the time for collection of a judgment by execution after suit. In short, there is no statute pre-

scribing the time limit within which a distraint warrant may be issued under Section 3186, et seq., of the Revised Statutes, after an assessment has been duly made. Of course, a distraint warrant can not issue without an assessment, but *the limitation is upon the assessment and not upon the distraint.* The word "proceeding" in Section 250 (d) of the Revenue Act of 1921 is used in its correct legal sense as meaning a judicial proceeding.

IX.

This suit is expressly forbidden by Section 3224 of the Revised Statutes. That Section contains no exceptions.

The only judicial decision relied upon by the court below was *Ogden City* v. *Armstrong*, 168 U. S. 224. (Record, p. 106.) The court's reliance upon *Ogden City* v. *Armstrong* and disregard of the decisions of this Court construing and applying Section 3224 R. S., prove the assertion made in an earlier part of this brief that the district court reached its conclusion by absolutely ignoring the inhibition contained in Section 3224, for the tax involved in *Ogden City* v. *Armstrong* was not a Federal tax, and consequently this court arrived at its decision in that case without regard to the provisions of Section 3224 of the Revised Statutes.

In *Union Pacific Ry.* v. *Cheyenne*, 113 U. S. 516, 526, cited by the court in *Ogden City* v. *Armstrong*, this Court said that "Even a cloud cast upon his title by a tax under which a sale could be made would be a grievance which would entitle him to go into a court

of equity for relief." But in *Dodge* v. *Osborn*, 240 U. S. 118, *where a Federal tax was involved*, and Section 3224 had to be considered, this Court held that cloud upon plaintiff's title, under the same circumstances as in *Ogden City* v. *Armstrong*, constituted no valid ground for relief by injunction. Can there be any question as to which decision this Court will choose to follow in this case?

This Court indicated by its language in the case of *Dodge* v. *Osborn*, referring to Section 3224, that there might possibly arise a case where " by some extraordinary and entirely exceptional circumstance its provisions are not applicable." Such a case had apparently not come to the attention of this Court up to the time of its decision in *Dodge* v. *Osborn*, but the kind of case it evidently had in mind was such as *Lipke* v. *Lederer*, 42 Sup. Ct. 549, where this Court held that the exaction was not a "tax," and that Section 3224 did not apply. Such a case might also arise where an unauthorized person attempts without color of office or of law to enforce distraint for the collection of an alleged tax; but it can never apply in a case like the one at bar, where the tax in some amount was indisputably due under a decision of this Court (*United States* v. *Phellis*, 257 U. S. 156); the amount of the assessment was correct under a decision of the Court of Claims of the United States (*Phellis* v. *United States*, 56 Ct. Cls. 157); the assessment was made by the Commissioner of Internal Revenue and claimed by him to be correct; and the collection was attempted by a method prescribed by

law and by an officer authorized by law to make such collections.

The correct rule was laid down in the very learned opinion of Mr. Justice Brewer in *Snyder* v. *Marks*, 109 U. S. 189, 193, and from it this Court has never departed. Mr. Justice Brewer said:

> The inhibition of Section 3224 applies to all assessments of taxes, made under color of their offices, by Internal Revenue officers charged with general jurisdiction of the subject of assessing taxes * * *.

The application for relief in the case of *Snyder* v. *Marks* was on the ground that the limitation of time within which the assessment could be made had expired, and that the collection was being attempted by distraint in violation of the limitation of the statute. The case is therefore "on all fours" with the case at bar.

Section 3224 of the Revised Statutes of the United States was intended to apply exclusively to suits for the purpose of restraining the assessment of collection of the revenue. It was not enacted as a general limitation upon the jurisdiction of courts of equity, but as a prohibition against the interference of such courts with the assessment and collection of taxes by the general government and to require the payment of the tax as a condition precedent to the institution of a suit to test its validity.

By Section 19 of the Revenue Act of July 13, 1866, c. 184, 14 Stat. 152, the Congress of the United States prescribed the conditions upon which suits could be

brought for the recovery of any tax alleged to have been erroneously or illegally assessed or collected; the conditions being, briefly, the payment of the tax and an appeal to the Commissioner of Internal Revenue for the refunding thereof prior to the commencement of a suit. By Section 10 of the Act of March 2, 1867, c. 169, 14 Stat. 475, it was enacted that Section 19 of said Act of 1866 be amended "by adding the following thereto:"

> And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court.

In the Revised Statutes this amendment of and addition to Section 19 of the Act of 1866 is made a section by itself, Section 3224, and reads thus:

> No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

The word "any" was inserted by the revisers. *Snyder* v. *Marks*, 109 U. S. 189, 192; *Kensett* v. *Stivers*, 10 Fed. 517, 522.

As stated by Mr. Justice Blatchford in *Snyder* v. *Marks*, at p. 192:

> The first part of Section 19 related to a suit to recover back money paid for a "tax alleged to have been erroneously or illegally assessed or collected," and the section, after thus providing for the circumstances under which such a suit might be brought, proceeded, when amended, to say that "no suit for the purpose of restraining the assessment or

> collection of tax shall be maintained in any court." The addition of 1867 was *in pari materia* with the previous part of the section and related to the same subject matter. The "tax" spoken of in the first part of the section was called a "tax" *sub modo*, but was characterized as a "tax alleged to have been erroneously or illegally assessed or collected." Hence, when, on the addition to the section, a "tax" was spoken of, it meant that which is in a condition to be collected as a tax, and is claimed by the proper public officers to be a tax, although on the other side it is alleged to have been erroneously or illegally assessed. It has no other meaning in Section 3224. There is therefore no force in the suggestion that Section 3224, in speaking of a "tax," means only a legal tax; and that an illegal tax is not a tax, and so does not fall within the inhibition of the statute, and the collection of it may be restrained.

The statute inhibiting suits to restrain the assessment and collection of Federal taxes has been in effect in this country for practically fifty-six years, and when adopted was expressive of the law of the land as applied by courts of the United States from the early days of the Republic. Under it the revenue has been estimated with a degree of exactness and collected with a degree of certainty that would have been impossible without it. The emasculation of the statute by judicial decision would work havoc with the vital matter of collecting the public revenues.

X.

Importance of the Decision.

The decision of this case is of great importance, for all governmental functions depend upon the prompt collection of the revenue.

If the collection of a tax can be restrained by injunction, the right to withhold payment until after all questions as to the amount, legality, and the manner of collection are determined by judicial decision, will be available to all taxpayers, who can afford the luxury of litigation. The taxpayer with a large income may well conceive it to be good business to spend a portion in proceedings in equity to delay payment.

Since the decision of the District Court in this case was published (283 Fed. 300) there has been a rush of taxpayers seeking to avail themselves of the remedy of injunction. For all practical purposes, in some judicial districts, it is as though Section 3224 had been repealed, for when a demand is made on a taxpayer for the payment of what he regards as an illegal assessment he files a bill for injunction, under authority of *duPont* v. *Graham*. While most of the District Courts refuse to grant even a temporary restraining order, others have felt free to do so, without notice, and a number of these are being continued at the present time awaiting the decision of this Court in this suit.

If taxpayers are to be permitted to try out in advance of payment doubtful questions as to the legality and correctness of tax assessments, the difficulty and expense of collecting the revenue will be increased many fold, and the practice will result in serious interference with the needed revenues of the Nation. As stated by this Court in *Nichols* v. *United States*, 7 Wall. 122, 129:

> The prompt collection of the revenue, and its faithful application, is one of the most vital duties of government. Depending as the Government does on its revenue to meet, not only its current expenses, but to pay the interest on its debt, it is of the utmost importance that it should be collected with despatch, and that the officers of the Treasury should be able to make a reliable estimate of means, in order to meet liabilities.

It is unnecessary to discuss the wisdom or lack of wisdom of Section 3224; such questions are for the legislative branch of the Government. Nor is it considered necessary to discuss further the baneful results that flow from the issuance of injunctions to restrain the collection of taxes. The immediate results are all too obvious. If granted in one case, then all taxpayers dissatisfied with their assessments will seek the remedy rather than pay the tax. As wisely stated by the court in *Howland* v. *Soule*, Fed. Cas. 6800, 12 Fed. Cas. 743, 744:

> A person not pleased with a tax will readily conclude that it is illegal or erroneous, and a

suit for injunction follows * * *. To "tax and to please, no more than to love and be wise, is not given to man."

JAMES M. BECK,
Solicitor General.

NELSON T. HARTSON,
Solicitor of Internal Revenue,
CHESTER A. GWINN,
Attorney, Treasury Department,
of Counsel.

APRIL, 1923.

○

No. 846.

OCTOBER TERM, 1922.

IN THE

Supreme Court of the United States

HARRY T. GRAHAM, Individually and as Former Collector of Internal Revenue et al., Petitioners,

vs.

ALFRED I. DU PONT, Respondent.

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD DISTRICT.

BRIEF FOR RESPONDENT.

WILLIAM A. GLASGOW, JR.,
HENRY P. BROWN,
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ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD DISTRICT.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

The E. I. duPont de Nemours Powder Company (hereinafter called Jersey Company) was incorporated in 1903 under the laws of New Jersey and was engaged until October 1, 1915, in the manufacture and sale of explosives, and on that day, in pursuance of a "Plan of Financial Reorganization", transferred all its assets as an "entirety" and "as a going concern" to E. I. duPont de Nemours and

Company (hereinafter called Delaware Company) organized under the laws of the State of Delaware and thereafter the latter Company conducted the same business.

At all times since the organization of Jersey Company in 1903 and on September 30, 1915, Alfred I. duPont, respondent, was the owner of 37,767 shares of the common stock of that Company, and from the year 1912 all of said shares of stock stood in his name on the books of said Company.

In consideration of the transfer of all its assets, goodwill, etc. "as a going concern" to Delaware Company, the Jersey Company received 596,617 shares of debenture stock and 588,542 shares of common stock of Delaware Company, each share of the par value of $100, making a total par value of $118,515,900, and of this amount $30,234,600 of debenture stock was exchanged by the Jersey Company for its outstanding preferred stock and Thirty Year Bonds; the balance of the debenture stock, of the par value of $29,427,100 was retained by the Jersey Company in its treasury. The 588,542 shares of the common stock, of the par value of $58,854,200 was immediately distributed among the common stockholders of the Jersey Company; each stockholder of that Company receiving two shares of common stock of the Delaware Company for each share of common stock held by him in the Jersey Company, in which latter Company he retained his stock. By this distribution the respondent, Alfred I. duPont, received on or about October 1, 1915, a total of 75,534 shares of common stock of Delaware Company of the par value of $100 per share and retained his 37,767 shares of the common stock of Jersey Company.

When this financial reorganization was proposed to the stockholders of Jersey Company, respondent objected to it on two grounds, to wit: (1) that there was no necessity or occasion for such reorganization, and (2) that the value of the assets of Jersey Company to be transferred to the Delaware Company did not justify the issue by that Company of the $58,854,200 of common stock, paid up

in full. Respondent was then informed by the Treasurer of Jersey Company that this latter objection would be met by *writing up* on the books of the Company the value of profits which the Company expected to make in the manufacture of explosives under certain contracts with the Allies engaged in the European War, thus making the assets appear on the books as equal on October 1, 1915, to the par value of the stock issued by the Delaware Company (Rec. p. 14). The contracts aforesaid were unperformed and on a great number of them deliveries were not to begin until February, 1916. As a matter of fact, the estimated value of these *prospective profits were written up* on October 1, 1915, in the sum of $29,152,116.75 in order to apparently show on the books of the Company that the assets were equal to the par value of the common stock issued, to wit, $58,854,200. As of the day that this "write up" of assets was made on the books of the Company to show assets equal in value to the par value of the common stock, of $100 per share, the Government now values the common stock for tax purposes at $347.50 per share.

This is the valuation for income tax purposes which the Government now intends to enforce by distraint upon respondent's property, notwithstanding the fact that this Court in the case of United States *vs.* Phellis, 257 U. S. at page 170 held, as to this very common stock that:—

> "The common stock of the new Company, after its transfer to the old Company and prior to its distribution, constituted assets of the old Company which it now held *to represent its surplus of accumulated profits* * * *. But when this common stock was distributed among the common stockholders of the old Company as a dividend, then at once * * * the individual stockholders of the old Company * * * received assets of exchangeable and actual value * * * as the *result of a division of former corporate profits*, and drawn by them severally for their individual and separate use and benefit." (Italics ours.)

This Court found that this common stock of Delaware Company was held to "represent its surplus of accumulated profits" and yet while it appears that on October 1, 1915 there was a *write up* on the books of the Company of $29,152,116.75 of *prospective profits* in order to show assets sufficient to issue the common stock at par, $100 per share, *the Government now threatens distraint against respondent* to recover taxes for 1915 based on *a valuation* by it, of this stock, as of the day of the *write up, of $347.50 per share.*

On March 1, 1916, respondent filed his return of personal income for the year 1915 and "attached a statement in writing fully setting forth the entire transaction under which he received the 75,534 shares of common stock of the Delaware Company aforesaid" (Affidavit of Alfred I. duPont, Rec., p. 14).

Petitioner, Graham, in his affidavit, denies that such statement was filed by respondent, but does not deny that "95 per cent. of the stockholders, including all of the large stockholders of the Delaware Company, attached a like statement to their and each of their personal returns of total income for the year 1915, filed on March 1, 1916" (Rec., p. 15).

The Bureau of Internal Revenue considered, for some time, the question of liability for income tax of those receiving the common stock of the Delaware Company and advanced several inconsistent theories of liability with regard thereto, as follows:—

First.—The Commissioner of Internal Revenue took the position that this common stock of the Delaware Company represented a *stock dividend* when issued to stockholders of Jersey Company and, on that basis, assessed one of the stockholders of the latter Company, valuing the stock *at $100 per share.* The stockholder was required to pay the assessment under protest and suit is now pending to recover the money so paid. Afterwards Towne *vs.* Eisner, 245 U. S. 418, was decided by this Court and this theory of liability was abandoned by the Commissioner.

Second.—Late in the year 1918 or early 1919, the Commissioner's office evolved the theory that this distribution of common stock of the Delaware Company to the stockholders of the Jersey Company *"was a liquidation dividend"* and that stockholders of the Jersey Company receiving the same were taxable to the extent that the fair market value of the stock received by them "exceeded the cost to them or the fair market price or value as of March 1st, 1913, of their stock in the old corporation in stock of which the distribution was made." (See Affidavit Alfred I duPont, Rec., p. 15.) This theory was afterwards abandoned by the Commissioner of Internal Revenue.

Third.—In June, 1919, the Commissioner's office began discussing this transaction on the theory that it was "a property dividend." Counsel for the respondent interviewed the Commissioner at this time, who then referred the matter to the "Advisory Tax Board" created by the Act of 1918, Sec. 1301, d-2, which provided:—

> "The Commissioner may and on request of any taxpayer directly interested *shall* submit to the Board any question relating to the interpretation or administration of the income, war profits or excess profits tax laws, and the Board *shall report its findings and recommendations* to the Commissioner." (Italics ours.)

Counsel for respondent appeared at a hearing before said Board at Washington on June 30, 1919, and the matter was discussed orally and by brief, but the Board never made a report and after waiting until October 28, 1919, counsel for respondent on that day wrote to the Commissioner asking if something could not be done to bring the matter to a conclusion. To this letter the Commissioner never made reply.

The first intimation that respondent had that the Commissioner contemplated proceeding against him was on January 1, 1920, when he received from the collector,

Graham, a tax bill demanding the payment within ten days of $1,576,015.86 and as respondent subsequently learned the Commissioner claimed as the basis of this demand that the common stock of the Delaware Company received by respondent on October 1, 1915, "was a dividend in property" and that "the fair market value" of the stock when received was $347.50 per share". (Exhibit 15, Rec., p. 73.)

Respondent filed a claim in abatement of this demand.

Thereafter, in response to a request "from one of the members of one faction" of stockholders of the duPont Company "who, I think, is willing to pay the taxes, but thinks it better to wait until a decision of the Court", the Commissioner agreed "to withhold action on the claims for abatement" of the stockholders represented by Mr. F. S. Bright and Mr. J. P. Laffey. Subsequently, "the same courtesy" was extended to respondent and other stockholders who were not of the "faction" who were "willing to pay the taxes". (See Exhibit 17, Rec., p. 79.)

The case of U. S. vs. Phellis, 257 U. S. 156.

Phellis was "one of the members of the faction" of "stockholders of the duPont Company" who was willing to pay the taxes but "thinks it better to wait until a decision of the Court", (Exhibit 17, Rec., p. 79, Memo. G. M. March 10, 1920), and after the proposition contained in the letter of February 16, 1920 from F. S. Bright to the Commissioner of Internal Revenue (Exhibit Ex. 17, Rec., p. 79) and the acceptance thereof, Phellis withdrew his claim in abatement, paid the tax, under protest, and brought his suit in the Court of Claims to recover the amount paid. In the petition filed in the case, Phellis "admitted that the fair market value of each share was $347.50" and the evidence offered in support of this admission was the private sales between brokers of small lots of the stock aggregating 183 shares, out of the 588,542 shares outstanding, the stock not being listed on any market and there being no public sales. The method of keeping the price up in the

sale of the small lots which were sold is shown in the affidavit of Alfred I. duPont (Rec., pp. 24, 25). As soon as counsel for respondent saw the record in the Phellis case, he immediately wrote Mr. F. S. Bright urging that the fair market value of the stock was not in excess of par or $100 per share (the value which the Commissioner had fixed when he made the first assessment on the basis of a stock dividend) and insisting that the assessment of the stock at $347.50 per share was grossly unfair and that this valuation of the stock ought to be attacked in the Phellis case. (See letters of Wm. A. Glasgow, Jr., to F. S. Bright of February 21st and October 1, 1921, in affidavit of Alfred I. duPont. Rec., pp. 18, 19.)

These letters were referred by Mr. Bright to his associate, Mr. J. P. Laffey, General Counsel of the Company, who represented the faction of stockholders "willing to pay the taxes" just as soon as "a decision of the Court" could be secured sustaining the tax.

On February 24th, Mr. J. P. Laffey replied to these letters of counsel for Alfred I. duPont, saying (Rec., p. 20):—

> "With respect to your tentative suggestion that we make the further contention that in the event the Court finds this distribution to be taxable that the book value of the stock be taken as the basis of taxation and not the market value as the Government contends, I have given consideration to this and I desire to confirm my first impressions that it would not be to our interests as a question of policy to make this claim in this suit. * * * Again many interested stockholders prefer, if they are legally required to pay any tax on this distribution, to pay on the basis of $347.50 and obtain the advantage of having this stock on their books at this rate."

In other words, such stockholders calculated that they would make money by paying on this valuation under the rates of 1915, and take credit for losses on sales by them

in subsequent years, when the rates were much higher than 1915.

The respondent had neither bought nor sold any of this stock. What he held constituted his estate, and his effort to have the Court pass on the fair value of the stock was unsuccessful.

Counsel for respondent, filed a brief, as *amicus curiae*, in the Court of Claims in which he said, (Rec., p. 21):—

> "While some few shares of the New Jersey Company sold for $795 per share and of the Delaware Company sold for $347.50 per share no considerable part of the stock could have been sold at such figures, and this was the only evidence of valuation for assessment by the Government and was an 'unsafe criterion'. Eisner *vs.* Macomber, 252 U. S. at p. 215."

And the brief for Phellis in this Court had the following note (Rec., p. 21):—

> "While some few shares of the New Jersey Company stock sold in the market for $795.00 per share, and the Delaware Company stock for $347.50 per share, no considerable part of this stock could have been sold at such figures, and this was the only evidence of valuation used by the Government in the assessment and was an 'unsafe criterion', (Eisner *vs.* Macomber, 252 U. S. at p. 215). The book value of the stock was entirely disregarded, and this showed the Delaware Company stock worth not more than par. If the assessment had been based upon par as was attempted in Towne *vs.* Eisner, the plaintiff would have been charged with income of only $50,000 instead of being charged with income of $173,750.00 as he is."

Counsel for respondent was never able to get the question of the value of this stock fairly before the Court of Claims, but that Court adopted the value of $347.50 per share, admitted by the plaintiff, Phellis.

The Court of Claims held that the common stock of the Delaware Company received by the stockholders of Jersey Company was not taxable as income. On appeal, this Court (by a divided Court), reversed the Court of Claims, holding that the stock received as above set forth, was taxable as income at its fair value when received.

The opinion of this Court in the Phellis case was rendered on November 21, 1921, and on November 23, 1921, the Revenue Act of 1921 became a law.

It appears from the record that on March 1, 1916, respondent filed his income tax return for the year 1915 (Exhibit 1, Rec., pp. 40-45) and to correct an error therein as shown by Exhibit 2, respondent filed an amended income tax return about the second of March, 1916 (Exhibit 4, Rec., pp. 47-51).

On November 30, 1917, Internal Revenue Agent Forbes, at Baltimore, wrote the Commissioner of Internal Revenue giving him a report of Income Tax Inspector D. P. DuRoss of November 27, 1917, referring to the personal income tax returns of Alfred I. duPont for the years 1913, 1914 and 1915, and in referring to the common stock of the Delaware Company received by Alfred I. duPont on October 1, 1915, DuRoss reports as follows (Rec., p. 55):—

> "200% common stock dividend issued by E. I. duPont de Nemours Co., previously omitted . . . . . $7,553,400.00"

In other words, duRoss reported this dividend and placed a valuation thereon of $100 per share and recommended that upon this basis an additional tax of $455,246.07 should be assessed against the respondent for the year 1915.

Nothing further seems to have been done until on the 30th day of July, 1919, when Internal Revenue Agent in charge at Baltimore, McDannel, wrote the Commissioner of Internal Revenue, with reference to a re-investigation of the income tax return of Alfred I. duPont for the year 1915, and set forth a copy of a report made by Internal Revenue Agents

Joseph N. Benners and D. P. duRoss. (Exhibit 12, Rec., pp. 67-71.)

In this report the Internal Revenue Agents treat the distribution to respondent as being "in the nature of a liquidating dividend" (Rec., p. 69), and the estimated profit of $19,450,005.00 was arrived at in the following manner (Rec., p. 70):—

> "In determining the profits alleged to have resulted in 1915 from the distribution of two shares of common stock of E. I. duPont de Nemours & Co., or new company, for each share held in the E. I. duPont de Nemours Powder Co., or old company, the examining officers have taken $180.00 as the fair market value of the old common stock as of March 1, 1913, and $347.50 as the fair market value of the new stock at the time it was distributed."

Mr. McDannel's letter concluded as follows (Rec., p. 71):—

> "As the taxpayer has declined to sign an amended return or waiver for 1915, I recommend that suit be instituted under the Act of October 3, 1913, for $1,363,542.42.
>
> "Amended return for 1915, unsigned, is herewith endorsed."

The "amended return" enclosed by McDannel on July 30, 1919, to the Commissioner, *unsigned by anybody,* appears in the record as Exhibit 6 (Rec., pp. 57-62), and no amended return was ever made for Alfred I. duPont either by the Commissioner, the Collector, or Deputy Collector, and the basis of liability in this report and blank form of return was not adopted or approved by the Commissioner.

On January 1, 1920, the Collector presented a demand upon Alfred I. duPont for a further tax for the year 1915 in the sum of $1,576,015.86, which sum was arrived at by a

valuation of the 75,534 shares of common stock of the Delaware Company received by Alfred I. duPont on October 1, 1915, at $347.50 per share, amounting to $26,248,065.00 without any deduction for the valuation of the common stock of the Jersey Company held by him as of March 1, 1913. The demand of the Collector was not based upon any theory of liability which had theretofore been suggested in any of the reports upon the subject. (See Exhibit 13, Rec., p. 71.)

On January 30, 1922, the Bill in this case was filed in the District Court of the United States, for the District of Delaware, averring that the Collector of Internal Revenue, unless restrained, would proceed to levy and sell the property of Alfred I. duPont to pay this demand, and setting up that the Act of Congress forbade the attempt to collect the claim above mentioned; that the Collector had no right or authority in law to proceed to collect the claim by distraining upon the property of respondent, and that respondent was without remedy at law to enforce his rights.

On March 3, 1922, there was a hearing on plaintiff's motion for a preliminary injunction and on defendant's motion to dismiss the Bill of Complaint. In June, 1922, the District Court overruled the motion to dismiss the Bill, and granted the preliminary injunction, limiting the injunction, however, to restraining the defendant from collecting "or attempting to collect by distraint" the sum of money claimed by the Collector and provided that "this injunction, however, shall not operate to prevent a suit by the United States in a court having jurisdiction thereof, to recover from the said Alfred I. duPont any sum or sums of money which the United States may be advised it is entitled to." (Rec., p. 108.)

Collector Graham appealed from this decree to the Circuit Court of Appeals for the Third Circuit and that court affirmed the decree of the District Court.

The case is now in this court on writ of *certiorari* to the Circuit Court of Appeals for the Third Circuit.

ARGUMENT.

Respondent's position is based upon the following principal propositions:

A. A DISTRAINT BY THE PETITIONERS FOR THE PURPOSE OF COLLECTING THE ADDITIONAL INCOME TAX CLAIMED TO BE DUE FROM RESPONDENT FOR THE YEAR 1915, WOULD BE WITHOUT AUTHORITY OF LAW AND IN VIOLATION OF EXPRESS STATUTORY INHIBITION.

B. SECTION 3224 OF THE REVISED STATUTES DOES NOT PRECLUDE THE RESPONDENT FROM EQUITABLE RELIEF.

The first of these propositions ("A") is based upon the following contentions:—

1. The alleged assessment under authority of which the distraint is proposed to be made, is without authority of law, illegal and void.

2. The threatened distraint would be in violation of the express inhibition of Section 250 (*d*) of the Revenue Act of 1921.

These contentions will be considered in their respective order:

A-1. The alleged assessment under authority of which the distraint is proposed to be made, is without authority of law, illegal and void.

No extensive argument is necessary in support of the proposition that the threatened seizure and sale of appellee's property will be illegal and invalid, unless the tax claimed has been duly and properly assessed and the threatened proceedings are authorized by statute.

> "As the collector has no general authority to sell lands at his discretion for the non-payment of the direct tax, but a special power to sell in the particular cases described in the act, those cases must exist, or

his power does not arise. It is a naked power, not coupled with an interest; and in all such cases, the law requires that every pre-requisite to the exercise of that power must precede its exercise; that the agent must pursue the power, or his act will not be sustained by it."

Williams vs. *Peyton*, 17 U. S. 77, 79.

"A collector selling lands for taxes must act in conformity with the law from which his power is derived."

Early vs. *Doe*, 16 How. (U. S.) 610, 618.

"To divest an individual of his property, against his consent, every substantial requisite of the law must be shown to have been complied with."

Ronkendorff vs. *Taylor's Lessee*, 4 Pet. (U. S.) 349, 359.

"Summary proceedings are commonly authorized by law and resorted to for the collection of taxes. * * * But a law of this kind is strictly construed and will not be extended by implication, and strict compliance with its provisions is essential to the validity of the proceedings."

37 Cyc. 1231.

The following statutory provisions relate to the time and method of assessment of income taxes for the year 1915, under the Revenue Act of 1913:—

"That all assessments shall be made by the Commissioner of Internal Revenue and all persons shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the dis-

covery thereof, at any time within three years after said return is due, make a return upon information obtained as provided for in this section or by existing law, and the assessment made by the Commissioner of Internal Revenue *thereon* shall be paid by such person or persons immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of 5 per centum on the amount of tax unpaid, and interest at the rate of 1 per centum per month upon said tax from the time the same became due, except from the estates of insane, deceased or insolvent persons." (Italics ours.)

(Income Tax Act of 1913, Sec. E.) 38 Stat. at Large, 169.

"When any person, corporation, company or association refuses or neglects to render any return or list required by law, or renders a false or fraudulent reurn or list, the collector or any deputy collector shall make, according to the best information which he can obtain, including that derived from the evidence elicted by the examination of the collector, and on his own view and information, such list or return, according to the form prescribed, of the income, property, and objects liable to tax owned or possessed or under the care or management of such person or corporation, company or association, and the Commissioner of Internal Revenue shall assess all taxes not paid by stamps, including the amount, if any, due for special tax, income or other tax, and in case of any return of a false or fraudulent list or valuation intentionally he shall add one hundred per centum to such tax; and in case of a refusal or neglect, except in cases of sickness or absence, to make a list or return, or to verify the same as aforesaid, he shall add fifty per centum to such tax."

(Rev. Stat. Sec. 3176, as amended by the Income Tax Act of 1913.) 38 Stat. at Large, 179.

From these provisions it appears that:—

(*a*) No assessment could be properly made after June 1st, 1916, with respect to the respondent's income for the year 1915, unless the return filed by the respondent for that year was "false or fraudulent."

(*b*) If the return filed by the respondent was "false or fraudulent," no return could be properly made by the commissioner, collector or deputy collector after three years from March 1, 1916, upon which date respondent's return for the year 1915 was due and was made.

(*c*) If said return was "false or fraudulent" an additional assessment, to be valid, must have been based upon such return.

(*d*) The return upon which an assessment is based, must be made by the Commissioner, Collector or Deputy Collector and must be according to the form prescribed.

(*a*) It has been held that the proper meaning of the word "false" as used in the foregoing statutes is "not true" or "incorrect." (Woods *vs.* Lewellyn, 252 Fed. 106, 109, C. C. A. 3rd, Cir.) We will assume for argument's sake only, that this construction is correct.

(*b*), (*c*) and (*d*):—

1. No return was made by the Commissioner, Collector or Deputy Collector on behalf of the respondent within three years from March 1, 1916, or at any other time.

2. The alleged return relied upon by the petitioners and which apears at pages 57-62 of the Record as Exhibit 6, was not prepared until July, 1919.

3. The said alleged return was not made by the Commissioner, Collector or Deputy Collector.

4. The said return was not made "according to the form prescribed."

5. The assessment alleged to have been made by the Commissioner in December, 1919, was not based upon the alleged return.

The only return alleged by petitioners to have been filed upon behalf of the respondent is that which is designated as Exhibit 6 (Rec., pp. 57-62). In the affidavit filed by petitioner Graham, that return is referred to as follows (Rec., pp. 33-34):—

> "Affiant is informed and believes, from an examination of the records of the Bureau of Internal Revenue, that on November 27, 1917, Income Tax Inspector D. P. duRoss made a report to the Revenue Agent in Charge at Baltimore (Exhibit 5) showing the result of an investigation made by him of the complainant's tax liability for the years 1913, 1914, and 1915, and in said report said Inspector reported among other things that the complainant had received an income during the year 1915 '200 per cent. common stock dividends issued by E. I. duPont deNemours Co., previously omitted,' and that as a result of such investigation and other investigations the Commissioner of Internal Revenue, in the regular routine of office procedure, prepared a return upon information as provided for by Section 2E of the Income Tax Act of October 3, 1913 (Exhibit 6)."

Thus the petitioner studiously avoided any reference to the precise date when the alleged return was prepared, but insinuated that it was prepared by the Commissioner shortly after his receipt of Mr. D. P. duRoss' report dated November 27, 1917, and, therefore, well within the three year period dating from March 1, 1916.

An examination of Exhibit 5 (Rec., p. 52), which sets forth the report made by Income Tax Inspector D. P.

duRoss under date of November 27, 1917, and Exhibit 12 (Rec., p. 67), which is a letter from the Internal Revenue Agent in Charge of the Baltimore Division, setting forth a copy of a report made by Examiner D. P. duRoss and Joseph N. Benners under date of *July 22, 1919*, shows beyond any question that the alleged return referred to by the petitioner Graham as Exhibit 6, was not prepared by the Commissioner, as stated by said appellant, nor was it prepared by the Collector or Deputy Collector.

Upon the contrary, the alleged return was prepared by the inspectors or examiners already named, and was attached to their report of *July 22, 1919*, to which we have referred. In that report the said return is referred to by said inspectors in the following language (Rec., p. 69):—

> "Unsigned amended return attached, respondent declining to sign either amended return or waiver."

It is the same alleged return which is again referred to by the Internal Revenue Agent in Charge, on the final page of Exhibit 12, and under date of July 30, 1919, as follows (Rec., p. 71):—

> "Amended return for 1915, unsigned, is herewith enclosed."

The facts show, therefore, that no return was filed upon behalf of the respondent within three years from March 1, 1916, and the District Judge so found, stating, (Rec., p. 103):—

> "The evidence clearly shows that this amended return was made not earlier than July 22, 1919."

Nor is there any evidence that the Commissioner or Collector ever adopted or gave effect to the alleged return known as Exhibit 6. Upon the contrary, the said return is neither signed nor sworn to by anyone and is not "according to the form prescribed" in that it fails to comply with

the sixth paragraph of the "Instructions" on the last page of said return, which reads as follows:—

> "6. This return, properly filled out, must be made under oath or affirmation. Affidavit may be made before any officer authorized by law to administer oaths."

Moreover, the assessment alleged to have been made by the Commissioner in December, 1919, was not based upon the alleged return under discussion.

The Revenue Act of 1913 requires, as already shown, that the assessment made by the Commissioner shall be based upon a return made as provided for by the Act.

The alleged return relied upon by the petitioners shows a total tax liability of $1,549,178.06 (Rec., p. 58), of which $185,635.64 had been paid, leaving a balance of $1,363,-542.64 alleged to be due (Rec., p. 68).

The additional tax alleged to have been assessed by the Commissioner, however, was for $1,576,015.86, and this figure was based not upon the aforesaid return, but upon an audit referred to in the Commissioner's letter to the Internal Revenue Agent in Charge at Baltimore, dated December 12, 1919, and known as Exhibit 13 (Rec., p. 71).

In the alleged amended return, (Exhibit 6), which was forwarded as a part of that letter, (Exhibit 12), it is shown that the Internal Revnue Agent in Charge, valued the 75,534 shares received by the appellee, at $347.50 per share, or a total of $26,248,065, and deducted therefrom the fair market value per share on shares held on March 1, 1913, to wit: 37,767 shares at $180 per share, or a total of $6,798,060, leaving an alleged "profit" subject to taxation of $19,450,005 (Rec., p. 69), and this latter figure appears on page 1 of Exhibit 6 as "taxable income"; whereas the Commissioner in his letter of December 12, 1919, (Exh. 13, Rec., pp. 71, 72) based his claim for $1,576,015.86 on 75,534 shares of stock at $347.50 per

share, a total alleged profit of $26,284,065, without any deduction for value of shares as of March 1, 1913. So that neither the claim of the Commissioner under the letter of December 12, 1919, nor the alleged assessment then made, were based upon Exhibit 6, or any other amended return made for the respondent.

To summarize:

1. The only return alleged by petitioners to have been made upon behalf of respondent, was not made until July 1919, or thereafter.

2. The alleged return relied upon by the petitioner was not such a return as was contemplated by the Act, as it was not made by the persons designated or in the manner prescribed.

3. The assessment was not based upon the alleged return.

4. The assessment was not made until December, 1919.

We submit, therefore, that in making the assessment which is relied upon by the petitioners to justify the threatened distraint, the Commissioner not only failed to comply with the requirements of the law, but was without any jurisdiction whatever to make that assessment at the time that it was made. Under these circumstances the assessment is not merely irregular but void.

> "What is complained of is no mere irregularity or error in the assessment. As we have seen, there was an entire want of jurisdiction in the common council to proceed for want of the assent of the requisite proportion of property owners, and the assessment and tax were, therefore, void."
>
> *Ogden City* vs. *Armstrong*, 168 U. S. 224, 237.

It follows that there is no basis for any summary proceedings by distraint to enforce payment of the additional tax claimed by the petitioners.

In the foregoing argument we have proceeded upon the assumption that Section E of the Income Tax Act of 1913, already quoted, requires the return to be made by the Commissioner, Collector or Deputy Collector "within three years *after said return is due.*"

This construction is so obviously in accordance with the letter as well as the spirit of the provisions in question and is so manifestly reasonable, that it would require no argument in its support were it not for the fact that the petitioners have seriously asserted a wholly different construction of those provisions.

The petitioners contend that the three years period referred to in Section E of the Act relates merely to the time within which the discovery of the omission of income must be made, and has no reference to the period within which the Commissioner must file a return. This is likewise the position taken by the Commissioner in his letter of February 3, 1920, addressed to the respondent (Rec., p. 76).

For convenience we again quote the relevant provisions of the Act of 1913, as follows:—

> "That all assessments shall be made by the Commissioner of Internal Revenue and all persons shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as provided for in this section or by existing law, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such person or persons immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, and for ten days after notice and demand thereof by the collec-

tor, there shall be added the sum of 5 per centum of the amount of tax unpaid, and interest at the rate of 1 per centum per month upon said tax from the time the same became due, except from the estates of insane, deceased, or insolvent persons."

Under the construction contended for by the appellants, if any error was discovered by the Commisisoner within three years, he would have had authority *at any time thereafter,* no matter how remote, to make a return and assessment and proceed to collect the tax by summary process.

Under this construction the authority of the Commissioner to proceed by summary proceedings, would not necessarily be determined by any matter of record, but would depend entirely upon whether he or his predecessor in office had knowledge of the error within the three years period. The burden would be upon the taxpayer to disprove such knowledge and this whether the Commissioner was alive or dead or otherwise unobtainable as a witness. Thus every case wherein a return was filed after the three years period would necessarily involve the question of fact as to whether the alleged error had been discovered within said period by the Commissioner then in office.

Under the construction contended for by the petitioners, it might be argued that however insignificant the error discovered by the Commissioner within the three years period, he would be at liberty at any time thereafter to make a return and assessment rectifying not only the alleged error so discovered, but any other alleged errors discovered thereafter. That very question, in fact, would under the said construction arise in the present case.

As opposed to the petitioners' construction, the respondent contends:—

First.—That even assuming for argument's sake merely, that there is a doubt as to the proper construction of the provisions in question, that doubt should be resolved in favor of the taxpayer.

> "When a statute providing for taxation is of doubtful construction, the doubt is to be resolved in favor of the taxpayer." *22 Cyc. 1605.*

Second.—If it had been the intention of Congress to make the three years period applicable solely to the discovery of error, that intention would have been unmistakably signified by the omission of the comma after the word "thereof", so that the clause would have read as follows:

> "* * * the Commissioner of Internal Revenue shall, upon the discovery thereof at any time within three years after said return is due, make a return * * *"

Third.—If the three year period is considered as applicable to the return, the application of the Section will not depend upon the uncertain or prejudiced memories of Commissioners, or the credibility of their testimony, or their availability as witnesses, but upon the contrary, will be determined by a concrete matter of public record. That record is afforded by the return which must be filed within the three years and the assessment must be based on that return. Otherwise the government must sue for the tax claimed and the taxpayer is entitled to protection against summary procedure.

That the three years period applies to the return and assessment, is recognized in the following quotation from **Woods vs. Lewellyn 252 Fed. 106, 109, (C. C. A. 3rd Cir. 1918):**

> "The tax for 1913 was not *assessed* until May, 1915; but this was in time under paragraph E, if the plaintiff's return was 'false'." (Italics ours.)

In other words, it is assumed by the Court that it is the *assessment* and not the *discovery* which determines the applicability of the three year period.

In Eliot Nat. Bank *vs.* Gill, 218 Fed. 600, 602 (C. C. A. *1st Cir.*), and in Penrose *vs.* Skinner, 278 Fed. Rep. 284,

286, 287 (District Court, Colorado, 1921), the dicta of the Courts is opposed to respondent's contention, but the reasoning upon which the conclusions are based is not set forth.

In Montgomery's Income Tax Procedure, Ed. 1922, p. 196, foot note 17, our view is stated by the author as follows:—

> "The Bureau claims (B. 49-20-1337; Sol. Op. 79) that if a 'discovery' shall have been made within three years from the time the return was due assessment may be made at any time thereafter. Such, however, could hardly have been the intention of the law. The punctuation conveys to the author the very clear meaning that assessments must be made immediately after discovery and the additional tax must be paid upon demand and that the discovery and the assessment must be made within three years from the time when the return was due. Any other construction requires a vivid imagination. As the section covers the imposition of penalties it should be construed in favor of the taxpayer. The United States courts have not specifically passed upon the question. In a suit brought within three years from the time when a return was due (Eliot National Bank *vs.* Gill, 218 Fed. 600) the court said that the tax could be assessed after three years if the fact that it was due was discovered within the three years. But the point in question was not before the court, so the statement is dictum, and need not be considered a precedent."

We submit, therefore, that the three year period relates to the time during which the return must be made.

A clear recognition of the impropriety of summary proceedings after the expiration of three years from March 1, 1916, is found in the following paragraph quoted from the last page of the letter of July 30, 1919, addressed to the Commissioner by the Internal Revenue Agent in Charge of the Baltimore Division (Rec., p. 71):

> *"As the taxpayer has declined to sign an amended return or waiver for 1915, I recommend that suit be*

instituted under the Act of October 3, 1913, for $1,363,542.42."

The second contention in support of our principal proposition that the threatened distraint would be without authority of law and in violation of express statutory inhibition is, as already stated, as follows:—

A-2. The threatened distraint would be in violation of the express inhibition of Sec. 250 (d) of the Revenue Act of 1921.

The material provisions of that section read as follows:—

> "(*d*) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits or war-profits tax Acts, or under Section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, shall be determined and assesed within five years after the return was filed, unless both the Commisisoner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under Section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act."

On January 30, 1922, when this proceeding was instituted, more than five years had expired since March 1, 1916, when

respondent's return was filed, and a distraint or seizure of his property at that time would have constituted a "proceeding" within the inhibition of the provisions quoted above.

That this is the proper construction of the foregoing provisions appears unmistakably from the fact that they forbid a *determination* and *assessment* after the five year period "unless both the Commissioner and taxpayer consent in writing to a later determination, assessment *and collection* of the tax."

In other words it was recognized by Congress that consent to merely a *determination* and *assessment* of the tax after the five year period would be futile, because even if the tax should be thus determined and assessed, its *collection* would still be impossible because of the provisions forbidding the commencement of "any suit or proceeding for the collection" of the tax after the five year period.

In order to make the consent of the taxpayer effective, therefore, it was provided that it should relate not only to the *determination* and *assessment* of the tax but to its *collection.*

That the phrase *"proceeding for the collection of any such taxes"* as used in Sec. 250 (*d*) contemplates a *collection by distraint,* is also evidenced by other provisions of the Revised Statutes.

Sec. 3190 R. S. provides for *"Proceedings on Distraint."* (U. S. Compiled Statutes, 1901.) Sec. 3187 R. S., provides that in case of refusal or neglect to pay any taxes, the Collector may "collect the said taxes * * * by distraint." Sec. 3196 R. S. provides that "When goods, chattels, or effects sufficient to satisfy the taxes imposed upon any person are not found by the Collector or Deputy Collector, he is authorized to collect the same by seizure and sale of real estate." Sec. 3197 R. S. deals with "Proceedings for seizure and sale of real estate for taxes." (U. S. Compiled Statutes, 1901.) Sec. 3207 R. S. provides that where it has become necessary to seize and sell real estate to satisfy taxes, the Commissioner may direct a Bill in Chancery to be filed, bringing in all persons interested in said real estate, and decree a sale thereof and distribute the proceeds.

The foregoing statutes designate the *proceedings* which are available to the Collector *for the collection of a tax,* and are obviously contemplated by the inhibition of Sec. 250 (*d*) against any *"proceeding for the collection of any such taxes."*

Congress could have had no reasonable object in prohibiting, after the five year period, such a suit as is contemplated by Sec. 3207 R. S., while allowing a distraint or seizure after that period under Secs. 3187 and 3196 R. S. Likewise, if, as petitioners claim, Congress had intended to impose no time limit upon the right of the Government to collect a tax by *distraint,* provided an assessment had been made within five years from the time the tax was due, it is difficult to understand why, in a case where such an assessment had been made, Congress expressly prohibited the collection of such tax by suit after the expiration of said period.

The remedy of distraint has always been the customary method employed to collect taxes, and it has been only in very exceptional cases that the Government has ever resorted to suit. What purpose could Congress have had in mind in depriving the Government of an extraordinary remedy rarely used, while leaving unaffected the customary proceeding by distraint? The obvious intention of Congress was to protect the taxpayer. But what possible reason could there be for protecting him against procedure almost never employed by the Government, if no protection was to be afforded him against the usual and ordinary method of proceeding by distraint?

Also, under the theory advanced by the petitioners, the words "or proceedings" would have comprehended only that which would be included in the ordinary definition of the word "suit," and would, therefore, have been mere surplusage.

In Montgomery's Income Tax Procedure, Ed. 1923, the argument is well stated at page 222:—

> "The use of the word "proceeding" in the 5-year limit for suits also shows that Congress meant that the taxpayer must receive notice within five years.

> The words 'determined and assessed' certainly cannot include the distraint warrant. The word 'proceeding' was no doubt intended to cover distraint warrants. There would be no meaning in having an amount payable if it could not be collected either by distraint or suit. The Treasury does not agree with this interpretation of the word 'proceeding.' A ruling has been issued (I-37-504; I. T. 1446) holding that the word 'refers only to judicial proceedings for collection of such taxes and not to the summary proceedings by means of distraint.' It is significant that no reasons are stated to support the conclusion, and, furthermore, when the distraint warrant is referred to in the ruling it is called 'the summary proceeding,' yet the use of a distraint warrant is claimed not to be a 'proceeding.' "

The provisions of Sec. 250 (*d*) which require *determination* and *assessment* of the tax within the five year period, obviously relate to the functions of the Commissioner and impose restrictions upon his authority; while it is equally apparent that the provisions which enjoin any *suit* or *proceeding* for the collection of the tax after the prescribed period, relate to the functions of the Collector and are intended to impose restrictions upon his authority to collect taxes which have been assessed by the Commissioner, regardless of the method of collection adopted. The statute makes a clear distinction between the determination or assessment of the tax by the Commissioners on the one hand and on the other the collection of the tax so assessed by the Collector by "suit or proceeding." It is not the assessment prior to "the passage of this Act" which precludes the enforcement of the limitation, but the beginning of a "suit or proceeding for the collection" of the tax by the Collector.

Moreover, while we contend that the limitation imposed by Section 250 (*d*) applies whether or not there has been an assessment, we also take the position, already explained, that the assessment relied upon by the petitioners is illegal and void and that the situation is the same as though

no assessment had been made. If this contention is correct, it is immaterial whether or not distraint is contemplated by the word "proceeding", as neither assessment nor distraint would have been made within the five year period.

We submit, therefore, that the express language and obvious purpose of Section 250 (*d*), was to afford the honest taxpayer, after the expiration of the five years period, protection against the institution of any proceedings whatever, whether by distraint or otherwise, which have for their object the collection of a tax, and regardless of whether there had or had not been an assessment

We also submit that the foregoing argument demonstrates the correctness of our first principal proposition that a distraint by the petitioners for the purpose of collecting the additional income tax claimed to be due from respondent for the year 1915, would be without authority of law and in violation of express statutory inhibition.

Our second principal proposition, already stated, is as follows:—

B. Section 3224 of the Revised Statutes does not preclude the respondent from equitable relief.

Section 3224 R. S. is as follows:—

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

There is no occasion to review at length the cases in this Court discussing the right of injunctive relief against the assessment or collection of taxes. The latest decision of this Court as to the effect of Section 3224 R. S., is in the case of **Hill vs. Wallace, 259 U. S. 44,** in which this Court affirmed the action of the District Court in enjoining the collection of a federal tax and held as follows (p. 62):—

> "A further question arises as to whether this is a suit for an injunction against the collection of the taxes in violation of Section 3224 Rev. Stats., in so

> far as it seeks relief against the District Attorney and Collector of Internal Revenue. Were this a State act, injunction would certainly issue against such officers under the decisions in *Ex Parte* Young, 209 U. S. 123; Ohio Tax Cases, 232 U. S. 576, 587; McFarland *vs.* American Sugar Refining Company, 241 U. S. 79, 82. Does Section 3224 Rev. Stats. prevent the application of similar principles to a federal tax act? It has been held by this Court, in Dodge *vs.* Brady, 240 U. S. 122, 126, that Section 3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable."

The "extraordinary and entirely exceptional circumstances" referred to in that case, consisted of the fact that failure to pay the tax would subject the taxpayer "to heavy penalties" and that recovery of the amount paid by the Board of Trade "would necessitate a multiplicity of suits and indeed, would be impracticable."

In the present case the "extraordinary and entirely exceptional circumstances" making Section 3224 R. S., inapplicable are as follows:—

1. The Commissioner had no jurisdiction to make the assessment relied upon and the assessment was, in consequence void.

2. Section 3224 R. S., when construed in connection with Section E of the Revenue Act of 1913 and with Section 250 (*d*) of the Revenue Act of 1921, does not forbid equitable relief under circumstances such as exist in the present case.

3. Unless the respondent is afforded equitable relief, he will be without legal remedy or such remedy would be inadequate.

We will consider these contentions in their respective order:—

B-1. The Commissioner had no jurisdiction to make the assessment relied upon and the assessment was, in consequence, void.

We have already shown that the Commissioner had no jurisdiction to make the assessment relied upon by the petitioners and that the assessment was, therefore, void. The following cases show that under such circumstances Section 3224 has no application:

In *Ledbetter* vs. *Bailey, Collector of Internal Revenue,* 274 Fed. 375, 380, 381 (District Court W. D. North Carolina, July, 1921), it was stated as follows:—

> "This" (Sec. 3224) "is a statute having in view the orderly and uninterrupted collection of the revenues of the Government, which are necessary to meet its current expenses and public obligations. But in order to make this statute applicable, a tax which is to be collected must be lawful, it must be founded upon some proper subject of taxation, must be assessed in a proper way, and collected in a legal manner."

In *Polk* vs. *Page, Collector of Internal Revenue,* 276 Fed. 128, 133, 134, it was held by the District Court of Rhode Island as follows:—

> "Dodge *vs.* Osborn recognizes that there may be exceptional cases to which the provisions of section 3224 are inapplicable. * * *
>
> "It may be said that plaintiffs seek only protection against action which is not a collection of a tax in the sense of the statute (section 3224) but, on the contrary, a violation of a statute (section 408). * * *
>
> "We may look into the statute sufficiently to determine whether the act complained of is "the collection of a tax" or a merely illegal and unauthorized act of a person without statutory authority. * * *

"The question of the power of a collector to distrain before the time fixed by the statute from which his power is derived is a judicial question. Acting without statutory authority, the distraint would be merely an unlawful seizure of property. * * *

"The plaintiffs, in my opinion, make a case justifying the interposition of a court of equity, in order to prevent irreparable injury from an unlawful act. Furthermore, I am of the opinion that section 3224, R. S., does not forbid an injunction against a ministerial officer proceeding without authority and in violation of the controlling statute, since by the term 'collection of a tax' is meant a proceeding in accordance with law, and not a merely unlawful and unauthorized act."

While the conclusion reached by the District Court in the above case was reversed by the Circuit Court of Appeals (Page *vs.* Polk, 281 Fed 74, C. C. A. 1st Cir.) the decision of the appellate court was based upon the proposition that the plaintiff had an adequate remedy at law and that the Court below was, therefore "without authority to grant the injunction irrespective of the inhibition contained in Sec. 3224 of the Revised Statutes." (See also Nichols *vs.* Gaston, 281 Fed. 67, 70, C. C. A. 1st Cir.)

In *Frayser* vs. *Russell,* Fed. Cas. No. 5067 (Circuit Ct. Va. 1878), in restraining the collection of an additional assessment of 4 cents per pound on tobacco, it was held that:—

"The course for the collector to pursue, even if this latter four cents had been a proper demand as a tax, was marked out to him by Section 3371 of the Revised Statutes of the United States. The collector did not take the course directed by law in a case where 'the proper stamps' had not been used, and the proper tax had been 'omitted to be paid.' His threatened levy was for what was not a tax; and it was threatened to

be made in a manner which set at naught the provisions of Section 3371. It was a clear case for the exercise of the restraining power of the court, and was not a case falling either within the letter, or spirit, or intention of Section 3224."

In *Ogden City* vs. *Armstrong,* 168 U. S. 224, it was held at pages 236, 237 and 240, as follows:—

"It is doubtless true that the collection of a tax will not be restrained on the ground that it is irregular or erroneous. Errors in the assessment do not render the tax void; and usually there are legal remedies for all such mere irregularities and errors as do not go to the foundation of the tax, and parties complaining must be confined to these. As was held by this court in Dows *vs.* Chicago, 11 Wall. 108: 'A suit in equity will not lie to restrain the collection of a tax on the sole ground that it is illegal. There must exist in addition special circumstances, bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant.'

"But the present case would seem plainly to be one of equitable jurisdiction within the doctrine of that case. What is complained of is no mere irregularity or error in the assessment. As we have seen, there was an entire want of jurisdiction in the Common Council to proceed for want of the assent of the requisite proportion of property owners, and the assessment and tax were, therefore, void. * * *

"Again, it is contended on behalf of the appellant, that the defendants cannot recover the taxes paid by them under protest because the Session Laws of Utah, 1890, Sec. 1, p. 38, provide that 'any party, feeling aggrieved by any such special tax or assessment, or pro-

ceeding, may pay said special tax assessed or levied upon his property, or such instalments thereof as may be due, at any time before the same shall be delinquent, under protest, and with notice in writing to the City Collector that he intends to sue to recover the same, which notice shall particularly state the alleged grievances and grounds thereof; whereupon such party shall have the right to bring a civil action within sixty days thereafter, and not later, to recover so much of the special tax as he shall show to be illegal, inequitable and unjust, the cost to follow the judgment, to be apportioned by the Court as may seem proper, which remedy shall be exclusive.

"As respects this contention we agree with the Supreme Court of the Territory, that this statute applies to cases where there are only errors, irregularities, overvaluations or other defects which are not jurisdictional, but that where the council, not having the jurisdiction to levy the tax, could not proceed under the statute, the taxpayers need not proceed under the statute to recover the money paid. Where the tax was wholly void and illegal, as in this case, the statute and its remedies for errors and irregularities have no application."

The foregoing cases show that Sec. 3224 R. S., is applicable when the injunctive relief prayed for is dependent upon mere errors or irregularities in the assessment which do not go to the foundation of the tax. In such cases it may be properly said that provided the assessment is made under color of their offices by proper government officials charged with general jurisdiction of the subject of assessing taxes, the taxpayer is remitted to his legal remedy if there be one. When, however, it is no mere error or irregularity in the assessment, which is complained of, but upon the contrary a complete want of jurisdiction in the Commissioner to make the assessment and the assessment is in consequence void, Sec. 3224 R. S., is not applicable.

It may be said of the federal tax system as it was said, in effect, in Ogden City *vs.* Armstrong, 168 U. S. 224, 240, *supra*, in reference to the laws of Utah, that the system prescribed by the United States with respect to the collection and refund of taxes, is intended to apply in all cases where the tax is properly assessed and collected, or where there is a mere irregularity or error in the assessment or collection which does not go to the foundation of the tax. But that where the assessment and, in consequence, the tax is wholly void and illegal, the statutes and their remedies for errors and irregularities have no application.

Our second contention in support of our second principal proposition is as follows:—

B-2. Sec. 3224 R. S., when construed in connection with Sec. E of the Revenue Act of 1913 and with Sec. 250 (d) of the Revenue Act of 1921, does not forbid equitable relief under circumstances such as exist in the present case.

As already shown, Sec. E of the Income Tax Act of 1913, authorizes assessment, in the case of "false" returns, within three years after the return was due. While Sec. 250 (*d*) of the Revenue Act of 1921, expressly prohibits "*any suit or proceeding for the collection*" of the tax after five years from the date the return was filed.

The statutory provisions referred to were enacted for the purpose of protecting the taxpayers against assessment and against any summary proceeding instituted to collect the tax, after the three and five years periods had elapsed. Can the petitioners successfully maintain that it was the intention of Congress that the taxpayer should be without any means of availing himself of this protection in case the Government officials chose to disregard the statutory limits imposed upon their authority?

Unless the respondent is entitled to equitable relief, he can in no way obtain the protection intended to be afforded him by Congress and the statutory limitations imposed

upon the authority of the Commissioner and Collector would be meaningless. Unless the Court may exercise its restraining influence in such a case as the present, there would be, in effect, no limitation upon the period during which an assessment or distraint might be made.

Such a result, so manifestly opposed to the intention of Congress, may be avoided by reading Section 3224, of the Revised Statutes and the Revenue Acts of 1913 and 1921, together and in the light of the authorities already cited.

When so construed, Section 3224 applies when the complaint is of some mere error or irregularity in the proceeding or an improper exercise of discretion upon the part of a government official, but does not forbid relief when the threatened distraint is not only based upon a void assessment but is also expressly forbidden by statute.

Revised Statutes Section 3224 provided that no injunction shall issue to restrain the assessment or collection of any tax, and by a later statute (Act of 1921) it is provided that no suit or proceeding shall be begun for the collection of any taxes after the expiration of five years after the date when the return was filed. It would seem obvious that the only way to enforce the provisions of the Act of 1921 would be by injunction if the Collector undertook to violate its provisions, and therefore Section 3224 and the Act of 1921, should be read together and in a case where the limitation bars the officer's right to proceed, it should be held that the provisions of the Act of 1921 supercede Section 3224.

The third contention in support of our second principal proposition, is as follows:—

B-3. Unless the respondent is afforded equitable relief, he will be without legal remedy or such remedy would be inadequate.

In ordinary cases of error or irregularity in assessment or collection, the tax system prescribed by Congress affords the taxpayer an adequate remedy. In such cases Sec.

3224 R. S. has been applied as a bar to equitable relief upon the theory that the taxpayers' remedy by claim for refund or suit was full and adequate or so regarded by the Court.

No Court, however, has denied and many have affirmed the proposition, that there may be exceptional cases where the system prescribed by Congress relating to claim for refund and suit, would afford the taxpayer either no legal remedy or one wholly inadequate, and that in such cases the taxpayer is entitled to equitable relief. (See Hill *vs.* Wallace, 259 U. S. 44, *supra*, p. 28.)

Unless equitable relief is afforded the respondent in the present case, he will either be without legal remedy or such remedy will be inadequate for the following reasons:—

(a) The right given to the respondent by Sec. E of the Revenue Act of 1913 to be protected against assessment after the expiration of the three year period and the right given him by Sec. 250 (d) of the Revenue Act of 1921, to hold his property free from seizure and distraint after five years from the date when his return was filed, cannot be enforced in a court of law.

(b) There is no statutory provision under which the respondent may file a claim for refund, which is a condition precedent to the institution of suit.

(c) Assuming, for argument's sake, that a legal remedy would be available to the respondent, it would be inadequate to compensate him for the loss of his freehold.

With respect to the first reason:—

Sec. 250 (*d*) of the Revenue Act of 1921 as already shown, provides that:—

> "No suit or proceeding for the collection of any such taxes due under this act or under prior income, excess-profits, or war-profits tax acts, * * * shall be begun, after the expiration of five years after the date when such return was filed."

These provisions like any other statute of limitations, relate to *remedy* as distinguished from *right*. They, in effect, declare that although a tax may have been properly assessed and due and owing, yet the government is barred from collecting that tax after the prescribed period.

The statutory provisions in question confer upon the taxpayer a substantial right, the right to hold his property free from seizure and distraint after the five year period, and the only way in which the respondent may enforce this right and obtain the protection intended to be afforded him by Section 250 (*d*), is by asserting the provisions of that Section as a bar to the collection of the tax.

Moreover it would appear that the only right given to the taxpayer by that Section, is the right to oppose the collection of the tax after the five year period, and that if this right cannot be successfully asserted as a bar to collection, it becomes ineffective for any purpose whatever, for it is at least extremely doubtful whether such right as is given by Section 250 (*d*) could be made the basis of a suit by a taxpayer to recover the amount of a tax which has been collected. In such a suit the government would contend that its *right* to the tax was not impaired by Section 250 (*d*), and that that section relates solely to remedy and gave the taxpayer merely a personal defense which he had been unable to successfully interpose to the collection of the tax.

In any suit which may be brought by the Collector, the right given to the respondent by Section 250 (*d*) may be asserted as a defense. As against the threatened distraint proceedings, however, the only way in which respondent may interpose the right or defense afforded by Section 250 (*d*) is by a proceeding in equity.

Unless, therefore, the respondent is granted equitable relief, the provisions of Section 250 (*d*) prohibiting distraint after the five year period has expired, may be completely nullified at the option of the Collector, and the respondent will not only be unable to hold his property free from distraint or seizure as contemplated by the

statute, but in all probability will be precluded from any relief whatsoever based upon the provisions of that section.

That equity will ordinarily take jurisdiction and afford relief under such circumstances, is a matter of elementary law.

> "Equity will not suffer a wrong to be without a remedy. This maxim includes the whole theory of equity jurisdiction, that it affords relief wherever a right exists and no adequate remedy at law is available, subject to the rules already stated in respect to the scope and limits of equity jurisdiction. It is the application to equity of the broader legal maxim: *ubi jus ibi remedium.* In accordance with the maxim, where a statute creates a new right which cannot be adequately enforced at law, equity will contrive remedies and orders to enforce it, unless the statutory remedy is exclusive as determined by the usual rules. The fact that there has been no precedent will not deter a court of equity from awarding relief in a proper case."
>
> *21 C. J. 198.*

A like argument applies to the enforcement of the right given respondent by Sec. E of the Revenue Act of 1913 to be protected against assessment after the three year limitation.

(b) There is no statutory provision under which the respondent may file a claim for refund, which is a condition precedent to the institution of suit.

Sec. 3226 R. S., as amended by the Revenue Act of 1921, provides that no suit or proceeding shall be maintained for the recovery of any tax, "until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, *according to the provisions of law in that regard,* and the regulations of the Secretary of the Treasury established in pursuance thereof." (Italics ours.)

Sec. 3228 R. S., as amended by the Revenue Act of 1921, is the only statute under which a claim for refund may be filed which will afford a basis for a suit and this Section does not apply to a claim for refund of taxes paid under the Revenue Act of 1913. Section 3228, as amended is as follows:—

> "Sec. 3228. All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within four years next after payment of such tax, penalty, or sum.
>
> "This section, except as modified by section 252, shall apply retroactively to claims for refund under the Revenue Act of 1916, the Revenue Act of 1917, and the Revenue Act of 1918."

The Treasury Department shortly after the passage of the Act of 1921 considered the question of "authority for refund" under that Act, and with reference to the amendment of Section 3228. The ruling of the Commission will be found in Cumulative Bulletin I-1, January-June 1922, at page 312, as follows:—

> "It will be observed that this amendment served to extend the time within which claims for refund may be filed to four years and this provision is made retroactive in so far as it relates to claims for refund filed under the Revenue Act of 1916, the Revenue Act of 1917, and the Revenue Act of 1918. At the time of the passage of the 1921 Act more than four years had elapsed since the date of the payment of both the original and the additional tax, and as these payments were for a tax under the 1913 Act, and as Section 3228, Re-

> vised Statutes, is not made retroactive as to claims for refund under the 1913 Act, it follows that no relief is open to the taxpayer from this source."

It appears, therefore, that prior to the institution of the present suit, the ruling of the Commissioner was in accordance with the construction contended for by respondent, to wit: that Section 3228 was not made retroactive as to claims for refund under the Act of 1913, but was limited to the Acts of 1916, 1917 and 1918.

Petitioners themselves contend that the claim for refund which may be filed under Sec. 252 of the Revenue Act of 1921, as amended by the Act of March 4th, 1923, does not afford the basis for a suit but merely authorizes the Commissioner to refund at his discretion. Thus in their supplemental brief filed in the Circuit Court of Appeals petitioners state: "As a matter of fact, Section 252 has nothing to do with *when* claims for refund *must* be filed for the purposes of Sections 3220 and 3228 of the Revised Statutes, as amended, and such is the published decision of the Commissioner. (T. D. 3416, *supra.*)"

It appears, therefore, that respondent will be unable to file a claim for refund "according to the provisions of law in that regard," in case the petitioners are permitted to collect the amount of the tax claimed, and without such claims for refund respondent would have no remedy at law.

> "Men must turn square corners when they deal with the government. If it attaches even purely formal conditions to its consent to be sued those conditions must be complied with."
>
> *Rock Island etc., R. R.* vs. *United States,* 254 U. S. 141, 143.

If this be applicable, in requiring the strict compliance with the statute by persons who seek a remedy against the Government, it must be equally applicable in requiring

a clear remedy at law to be shown in existing statute, if on that ground persons are to be deprived of the benefit of protection by a Court of Equity.

(c) Assuming, for argument's sake, that a legal remedy would be available to the respondent, it would be inadequate to compensate him for the loss of his freehold.

In paragraph 18 of the Bill it is alleged that (Rec. p. 8):—

> "18. Complainant charges that the Collector of Internal Revenue for the District of Delaware intends to proceed by distraint or otherwise to collect from complainant the $1,576,015.86 referred to in the notice and demand of December 31, 1919, and that the said Collector will proceed to collect the same by distress and sale of complainant's lands and freehold in the District of Delaware, and that said demand on the part of the Commissioner of Internal Revenue constitutes a cloud upon the lands and freehold of complainant situate in Brandywine Hundred, New Castle County, Delaware; and that if the Commissioner proceeds to collect said demand by distress and sale of complainant's lands and freehold that the loss of his said freehold by means of a tax sale would be an irreparable damage to complainant. That by reason of the long delay on the part of the Commissioner of Internal Revenue, the 75,534 shares of common stock of the Delaware Company received by complainant on October 1, 1915, and now held by complainant are not salable, that no market can at present be found for said stock, and that complainant will be unable by the use of said stock to secure the money to prevent the sale of his freehold estate upon such distraint."

In Ogden City *vs.* Armstrong, 168 U. S. 224, 239, it was stated as follows:—

"In Union Pacific Railway *vs.* Cheyenne, 113 U. S. 516, 525, this court, through Mr. Justice Bradley, said:

" 'But it is contended that the complainant should have sought a remedy at law and not in equity. It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage or be subjected to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the taxpayer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which a sale could be made would be a grievance which would entitle him to go into a court of equity for relief.' Numerous cases to the same effect may be found cited in Cooley on Taxation, 543."

Upon the foregoing argument it is submitted that Section 3224, R. S., does not preclude the respondent from equitable relief.

We have shown not only that the respondent either has no legal remedy or that such remedy is doubtful and inadequate, but also that the assessment is void and the threatened distraint would be in violation of express statutory inhibition.

We submit, therefore, that the present case falls within the category of extraordinary and exceptional cases which have been held by this Court not to be within the inhibition of Section 3224 R. S.

CONCLUSION.

The only case cited by petitioners in their argument before the Circuit Court of Appeals which requires special comment, is that of Snyder *vs.* Marks, 109 U. S. 189.

Petitioners stated that this case "completely disposes of complainant's claim to equitable relief in the case at bar on all the grounds stated in his bill of complaint."

Petitioners, however, failed to distinguish between mere conclusions of law and averments of facts in support thereof.

Thus, in the Snyder-Marks case, while it is true that complainant alleged, first, that the assessment was void, because it did not show upon what it was based, nor upon what the taxes were alleged to be due, second, that the assessment was made more than fifteen months after the time which it embraced elapsed, and, third, that complainant was without adequate remedy, the *facts* showed no basis for any of these conclusions.

No facts whatever appear to have been averred in support of the third of these propositions. With respect to the first the Court held that the facts showed that the assessment was sufficiently certain. The second proposition was not even discussed because the only limitation upon the right of the Commissioner to make the assessment was contained in Section 3182 of the Revised Statutes, and that limitation was as follows:—

> "* * * the Commissioner of Internal Revenue may, at any time within fifteen months *from the time of the delivery of the list to the collector* as aforesaid, enter on any monthly or special list the name," etc.

It is obvious that this limitation lent no support to the allegation in the Snyder-Marks case that the assessment was void because it was made "more than fifteen months *after the time which it embraced had elapsed.*"

It is submitted, therefore, that there is not the slightest similarity between the *facts* in the Snyder-Marks case and those in the present case. Moreover in the Snyder-Marks case, this Court held that Section 3224 forbids injunctive relief only when the tax claimed *"is in a condition to be collected as a tax,"* and that "the list shows a tax which the appellant might be liable to pay, and one which the commissioner had general jurisdiction to assess against him," (109 U. S. at 192, 193), whereas in this case the claim is for *a tax which the collector is expressly forbidden to attempt to collect by any "suit or proceeding."*

In discussing the technical legal points of the present case, one is apt to lose sight of the substantive merits of the respective positions of the parties.

The facts show that the alleged return known as Exhibit 6 is not in proper form, nor made by the proper official; it was not made within three years from March 1, 1916; the alleged assessment relied upon was not even based upon the alleged return, and was likewise made after the three years period, and the tax claimed is based on a valuation of the stock far in excess of its real value.

In addition to this, we have the Act of 1921, expressly forbidding the collector from proceeding either by distraint or suit to collect any tax after five years from the date when the return was filed.

Regardless of these facts, we have the spectacle of a United States Government official insisting that although his threatened actions are in express violation of statutory inhibition, they cannot be enjoined because of a technical construction of Section 3224 of the Revised Statutes. According to his contention, he must, therefore, be permitted to collect the tax by distraint, although Congress has declared that he shall not, and respondent must be left to discover by long and tedious legal process whether or not there is any legal remedy by which he may obtain any redress for a wrong committed in violation of express statutory inhibition.

It is respectfully submitted that Congress has not intended to so restrict the jurisdiction of the Federal Courts that they are impotent to prevent the wrong threatened in this case.

Respectfully submitted,

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HENRY P. BROWN,
Counsel for Respondent.

APRIL 19TH, 1923.

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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

HARRY T. GRAHAM, INDIVIDUALLY AND AS former collector of internal revenue, et al., petitioners,
v.
ALFRED I. DUPONT, RESPONDENT.
No. 846.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

I.

THE AMOUNT OF THE TAX DUE TO THE UNITED STATES FROM THE RESPONDENT CAN NOT BE DETERMINED IN A SUIT FOR INJUNCTION TO RESTRAIN THE COLLECTION OF THE ASSESSMENT.

The respondent devotes a large part of his brief to an attempt to show that the amount of the assessment was larger than it should have been by the overvaluation of the distributed stock. We decline to be drawn into an argument on that point in this appeal.

The *amount* of the tax due to the United States depends directly upon the fair market value of the shares of stock of E. I. duPont de Nemours & Co.

on the date of their distribution as a dividend to the respondent. The value of such shares was determined to be $347.50 by the Commissioner of Internal Revenue in making the assessment, and by the Court of Claims in *Phellis* v. *United States*, 56 Ct. Cls. 157.

In order to obtain any judicial review of the Commissioner's assessment *as to the amount thereof*, respondent must first pay the tax under protest, file his claim for the refunding thereof within the time limit prescribed by law (Sec. 252, Revenue Act of 1921, as amended by the Act of March 4, 1923, Public No. 527), and if the claim is rejected or held for six months without a decision bring an action at law for the recovery back of the amount of tax paid (Sec. 3226, Revised Statutes, as amended by Sec. 1318 of the Revenue Act of 1921).

The statutes prescribe certain conditions upon which the Government consents to be sued in such matters and without complying with the prescribed conditions a taxpayer has no standing in any court to test the accuracy or validity of a tax assessment.

Howland v. *Soule*, Fed. Cas. 6800, Deady, 413;

Kissinger v. *Bean*, Fed. Cas. 7853, 7 Biss. 60;

Alkan v. *Bean*, 23 Int. Rev. Rec. 351, Fed. Cas. 202;

Kensett v. *Stivers*, 10 Fed. 517;

Snyder v. *Marks*, 109 U. S. 189, 193;

Kohlhamer v. *Smietanka*, 239 Fed. 408, 411;

Calkins v. *Smietanka*, 240 Fed. 138.

"Men must turn square corners when they deal with the Government. If it attaches purely formal conditions to its consent to be sued those conditions must be complied with." *R. I., Ark. & La. R. R. Co.* v. *United States*, 254 U. S. 141, 143.

II.

THE ASSESSMENT OF THE TAX MADE BY THE COMMISSIONER OF INTERNAL REVENUE IN DECEMBER, 1919, WAS LEGAL AND ITS COLLECTION BY DISTRAINT WAS NOT BARRED BY SECTION 250 (d) OF THE REVENUE ACT OF 1921 OR ANY OTHER STATUTE.

Outside of the attempt of the respondent to show that the valuation of the shares of stock was incorrect the only other grounds for relief insisted upon in his brief are the following:

1. "The alleged assessment under authority of which the distraint is proposed to be made is without authority of law, illegal, and void."

2. "The threatened distraint would be in violation of the express inhibition of Section 250 (d) of the Revenue Act of 1921."

These contentions will be considered in their respective order.

1. The assessment made by the Commissioner is legal. Viewed either in the light of the limitation contained in Section II E of the Income Tax Act of October 3, 1913, under which the tax was assessed, or under Section 250 (d) of the Revenue Act of 1918, if applicable, the assessment of the Commissioner was made within the statutory period and was a legal assessment. The assessment was made within

five years and was therefore within the limitation prescribed by the later Act. Whether the Act of 1918 applies only to taxes imposed thereunder may be an open question. The return was due and was made March 1, 1916, and the assessment was made on the December, 1919, list.

The assessment in this case was made under the Income Tax Act of October 3, 1913, Section II E of which provides:

> E. That all assessments shall be made by the Commissioner of Internal Revenue and all persons shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of *refusal or neglect* to make such return and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as provided for in this section or by existing law, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such person or persons immediately upon notification of the amount of such assessment.

By the word "false" contained in the foregoing paragraph is not meant "fraudulent," but merely untrue or incorrect. *Woods* v. *Llewellyn*, 252 Fed. 106; *Eliot Natl. Bank* v. *Gill* (D. C.) 210 Fed. 933, 939; *id.* 218 Fed. 600, 602, 134 C. C. A. 358; *Natl.*

Bank v. *Allen*, 223 Fed. 472, 478, 139 C. C. A. 20; *United States* v. *Nashville & St. Louis Ry.*, 249 Fed. 678, 161 C. C. A. 588. In any event the failure of the respondent to make a return of the income in question was a "refusal or neglect." Fraud is not essential. Respondent's return for the year 1915 was untrue and incorrect in the light of the decision of the Supreme Court in the *Phellis case*, in that he refused or neglected to make a return of the income received by him during said year in the form of common stock of the Delaware corporation. Consequently, it was clearly lawful for the Commissioner to assess the amount of tax due, upon the discovery thereof at any time within three years after the return was due.

Respondent's return for 1915 was due and was made March 1, 1916. That it was incorrect was discovered by the Commissioner in November, 1917. (Rec. p. 34.) A return upon information was made for him and he was notified of the amount due within three years of such discovery. (Rec. p. 57.) The amount of additional taxes due for the year 1915 was formally assessed against him in December, 1919, but the assessment was not enforced because of his claim for abatement and the agreement to await the decision of the Supreme Court in the *Phellis case*.

Under Section II E of the 1913 Act, if the discovery of the falsity of the return was made within three years the assessment could be made at any time thereafter. In the case of *Eliot National Bank* v. *Gill*, 218 Fed. 600, the Circuit Court of Appeals

for the First Circuit, construing similar provisions of the Corporation Excise Tax Act of August 5, 1909, held that the three-year limitation runs from the discovery that the return is incorrect or fraudulent rather than upon the assessment after such discovery. Dodge, Circuit Judge, delivering the opinion of the court, said:

> "The Commissioner's discovery of the facts regarding these deductions was made within three years after March 1, 1910, the year wherein the first of the three returns, afterward found erroneous, namely, that for 1909, was due, and his assessment of the amount of the deductions was made March 1, 1913. In the case of 'false or fraudulent' returns, the fifth subdivision of Section 38 of the act gives the Commissioner power 'upon the discovery thereof, at any time within three years after said return is due,' to make an additional assessment. *We agree with the District Court that this language does not prevent the making of the assessment after, if the discovery has been within, the three years.*" [Italics ours.] 218 Fed. 602.

And in *Penrose* v. *Skinner*, the District Court of the United States for the District of Colorado, where the same question was raised under the 1913 Act, said:

> "And on the second proposition above noted I would hold against the contention of the plaintiff, if it were now necessary to definitely rule upon it. *National Bank of Commerce* v. *Allen*, 223 Fed. 472, 139 C. C. A. 20; *Nat'l Bank* v. *Gill*, 218 Fed. 600, 134 C. C. A. 358.

> The language of the statute construed in those cases is identical with that found in the statute here under consideration in respect to the question raised." 278 Fed. 284, 286, 287.

The construction of the courts in the above-mentioned cases is correct, in that it gives effect to the words "upon the discovery thereof," whereas the construction contended for by the respondent is impossible without eliminating such words from consideration. Effect must be given to all the words of a statute, where possible.

Moreover, the construction of the courts agrees with the departmental construction of the Act of August 5, 1909, and the Act of October 3, 1913, and such has been the continuous and uniform construction of the Department ever since the enactment of said statutes. In case of ambiguity in a statute, contemporaneous and uniform executive construction is regarded as decisive and it should not be disturbed except for the most cogent reasons (*Brown, Admx.*, v. *United States*, 113 U. S. 568; *Shell's Exrs.* v. *Fauche*, 138 U. S. 562; *Fairbank* v. *United States*, 181 U. S. 283, 311).

The construction of the language of Sec. II E by the Circuit Court of Appeals for the First Circuit in *Eliot Natl. Bank* v. *Gill*, supra, was not "dicta," as stated in the brief of respondent. The question was actually involved in the case, as is clearly shown by the foregoing quotation from the opinion of the court.

Respondent in his brief raises other questions as to the legality of the assessment and discusses them at considerable length. Such, for example, as that Section II E of the Income Tax Act of October 3, 1913, requires a "return on information" to be made by the Commissioner, and that the return in this case was not (*a*) in the prescribed form, (*b*) made by the Commissioner himself or the collector or deputy collector, but was made by a revenue agent, (*c*) made within three years after the due date of the return, (*d*) and did not show the exact amount of tax as was shown by the assessment.

The foregoing objections to the form and manner of making the assessment are not entitled to consideration in this form of proceeding. At the most, they affect merely the regularity of the assessment and not the right of the respondent to relief in a court of equity. Such questions can be raised only in an action at law to recover back the tax after payment.

Nothing could be better settled by the decisions of this court than that neither the accuracy nor the validity of an assessment of a tax can be determined in a suit for injunction to restrain its collection. *Snyder* v. *Marks*, 109 U. S. 189; *Dodge* v. *Osborn*, 240 U. S. 118; *Pacific Whaling Company* v. *United States*, 187 U. S. 447.

This court has repeatedly held that the payment of a tax assessment is a necessary condition precedent to the right of a taxpayer to maintain a suit

to test its validity. *State R. R. Tax Cases*, 92 U. S. 575, 613; *Cheatham* v. *United States*, 92 U. S. 85, 88; *Bailey, Coll'r* v. *George et al.*, 259 U. S. 16.

III.

DISTRAINT FOR THE COLLECTION OF THE ASSESSMENT WOULD NOT VIOLATE SECTION 250 (d) OF THE REVENUE ACT OF 1921; AND EVEN IF IT DID, THE REMEDY WOULD NOT BE BY INJUNCTION TO RESTRAIN THE COLLECTION OF THE TAX.

The respondent contends that the threatened collection of the tax by distraint would be in violation of Section 250 (d) of the Revenue Act of 1921, because more than five years from the due date of the tax had expired before collection was attempted, and said Section 250 (d) contains a five-year limitation upon the collection of the tax by distraint, regardless of when the assessment was made.

The respondent misconstrues Section 250 (d). It does not contain a five-year limitation upon the collection by distraint of taxes due and assessed under the Income Tax Act of 1913. The applicable part of Section 250 (d) reads as follows:

> (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under

> section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act. * * *.

In this conjunctive provision, a limitation upon two separate acts is contemplated, (1) upon assessment, and (2) upon a "suit or proceeding."

Are these limitations separate and independent of each other or do they together form one limitation?

Is the limitation upon judicial remedy conditioned upon and a part of the preceding limitation as to assessments?

The Government submits that the latter construction is correct. Indeed, it is the only reasonable construction which would at once make the limitation fully workable and protect the public revenues.

There is normally and naturally a substantial interval of time between assessment and the judicial

proceeding to enforce it. When the assessment is made the taxpayer is notified and given a reasonable time to pay it. When that time has elapsed without payment a further notice is given to him either of a distraint or a suit. Distraint is almost invariably the remedy, as the Government rarely resorts to an action of law, and the distraint is always preceded by an admonitory notice, which again lengthens the interval between assessment and action to collect.

Bearing this in mind it is significant that the period of time within which an assessment must be made and the judicial proceedings begun *is the same* (four years as to one class of tax and five years as to another). If, therefore, the two limitations upon (1) assessment and (2) collections are separate and independent, it is strange that the same period of time should be allowed in both cases. It was intended that the Government could have the full period of time within which to assess. If it took the full time any interval between assessment and distraint or a suit at law would be impossible and, therefore, to construe the two limitations as separate and independent of each other would mean that either the period for assessment would be shortened or that the taxpayer would be unfairly treated by an assessment being *immediately* followed by a distraint or suit at law without notice and without any opportunity on the part of the taxpayer to pay the assessment before he either found his property seized or himself a defendant in a suit.

Such a construction is plainly unreasonable and as unfair to the taxpayer as to the Government. It is therefore necessary to find a more reasonable construction.

Such a construction is found in the second view which we have already suggested, and that is, that the provision contains a single limitation providing that *when taxes are not assessed within the statutory period,* there can thereafter be no suit or proceeding in the courts to enforce the liability.

Congress obviously meant that the Government could have the prescribed period of years to assess the tax, and recognizing the preexisting law that it could sue to enforce a tax liability *even though there were no assessment,* it further provided, in order to make its limitation effective, that *when the Government had not assessed the tax within the prescribed period* it could not sue in the courts, either at common law or in equity, to enforce the unassessed liability of the taxpayer.

If, however, the taxes were assessed within the prescribed period, then the limitation as to a "suit or proceeding" had no application and a suit could be begun at any time.

This construction is in harmony with the entire scheme of taxation, for a tax when assessed has always been a definite liability, and remains a perpetual lien upon the taxpayer's real estate and it was never intended that when a tax was once assessed that the taxpayer could escape by a limita-

tion of time. To do this would be to put a premium upon the neglect to pay taxes duly assessed.

What Congress did mean, as previously explained, was that if the Government did not do the taxpayer the justice of assessing the tax within the prescribed period, it could not thereafter enforce his general liability to pay the tax by any suit or proceeding in the courts.

The language of the section sustains this reasonable and practical construction, for it is to be noted that the provision says that "No suit or proceeding for the collection of any *such* taxes due under this act, or under prior income excess profits or war profits tax acts, or under any taxes due under section 38 of such act of August 5, 1909." What is the significance of "such"? It does not refer to the Acts under which the taxes were imposed, for specific reference is made to them in the section just quoted. "Such taxes" evidently refer to taxes *that have not been assessed* within the prescribed period.

Apart from these considerations there remains the further question, whether the limitation of a "suit or proceeding" does not have exclusive reference to proceedings in the courts. If so, it does not limit the power of distraint.

Obviously Congress simply closed the doors of its courts upon the collection of taxes not assessed within the prescribed period.

Such a limitation, working gross inequality between those who pay their taxes and those who refuse to

pay them, should be strictly construed. It does not in words refer to the executive power of distraint. The words used are the appropriate words to a judicial proceeding of any kind, whether it be a suit in the nature of a common-law action or one in equity.

To apply the limitation to the executive power of distraint it is necessary to read something into the act in favor of the slothful or unwilling taxpayer. The tax when assessed remains a lien upon the taxpayer's real estate. Will it be contended that a limitation upon a suit or proceeding involves the destruction of the statutory lien, and if the statutory lien remains, why should not the power to distrain?

Where an assessment is made no "suit or proceeding" is necessary to collect the tax. The assessment when made becomes "a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person." (Sec. 3186 R. S.)

The collection of a tax by distraint after assessment is an authorized and time-honored method employed by the Government, and it rarely resorts to judicial proceedings for the collection of its revenue. (Sec. 3184 R. S., et seq.) An assessment of a tax obviates the necessity of a suit for its collection. It would be unreasonable, therefore, to assume that Congress by

the second limitation contained in Section 250 (d) intended such limitation to apply to taxes that had been assessed within the time limit prescribed by the first limitation contained in said section.

As we have shown in our main brief, any other construction would make the provisions inconsistent with other provisions of the Act, and would reduce the five-year limitation upon assessments to less than five years. It is a principle recognized by this court that statutes should be construed, if practicable, that one section will explain and support and not defeat or destroy another section. *Bernier* v. *Bernier*, 147 U. S. 242.

Furthermore, an assessment becomes a lien on all the property of the taxpayer under Sec. 3186, and requires no judgment of a court for its satisfaction. An assessment is unnecessary as the basis of a suit to recover taxes, and a suit is unnecessary where there is a valid assessment. To hold that the right to distrain is limited to five years after the due date of the tax, as is the right to assess, would be to destroy the force and effect of an assessment, if made near the end of the five-year period. We find it impossible to believe that Congress intended, by its enactment of Section 250 (d) to destroy the effect of a large number of the then outstanding assessments.

As indicative of the intention of Congress, the following excerpts are taken from the report of Senator Penrose, Chairman of the Committee on

Finance, Report No. 275, 67th Congress, First Session, Calendar 289, Senate, p. 21, part IV.—Administrative Provisions. Payment of taxes * * *:

> The laws relating to the time within which assessments may be made, suits brought for the collection of taxes, refunds or credits for taxes filed, and *court actions* instituted for the recovery of taxes illegally or erroneously collected have in the past been uncertain and annoying to taxpayers.
>
> By Section 1322 of this bill the time for the making of an assessment increase of taxes other than income, excess-profits, war-profits, or corporation excise taxes under the act of August 5, 1909, has been limited to four years after the tax became due. In section 250 (d) the time for assessing income, excess-profits, and war-profits taxes under this bill has been limited to four years, and under prior acts to five years.
>
> Section 1320 of this bill prevents the bringing of any *suit or proceeding* by the Government *in any court* for the collection of internal-revenue taxes after the expiration of five years from the time such tax was due, except in the case of fraud. Heretofore, except in the case of income, excess-profits, and war-profits taxes under the revenue act of 1918, there was no limit upon the time in which the Government could bring suit for the collection of taxes. *Subdivision (d) of Section 250 contains limitations with respect to income and profits taxes similar to those contained in section 1320.* [Italics ours.]

P. 32. Limitations upon suits and prosecutions.

> Section 1320 prevents the bringing of any *suit or proceeding* by the Government *in any court* for the collection of internal-revenue taxes after the expiration of five years from the time such tax was due, except in the case of fraud or a willful attempt to defeat or evade tax. (See Sec. 250, Title II.) [Italics ours.]

The phraseology of Sec. 1320 of the Revenue Act of 1921 is—

"No suit or proceeding for the collection of any taxes shall be begun," etc. The Chairman of the Committee says this refers to proceeding "in any court for the collection of internal-revenue taxes" and that the limitation of 250 (d) with regard to suits is the same.

Respondent's entire argument is based upon the position that the word "proceeding" includes "distraint." He is sticking in the letter of the statute and not reaching its substance. The word "proceeding" has been used over and over again by Congress in conjunction with the word "suit" to refer to judicial proceedings and to judicial proceedings alone. Throughout the statutes of the United States the words are used together and separately, interchangeably and synonymously to refer to judicial proceedings, but never to executive action. (Revised Statutes, Sections 771, 774, 838, 3207, 3213, 3214, 3227, 3226.)

The references in respondent's brief (page 25) to the word "proceedings" in the Revised Statutes of the United States in connection with the collection of taxes by distraint are misleading. He refers to the publisher's headnotes, and not to the language of the statutes. Thus, the West Publishing Company's titles in U. S. Comp. Stat., 1916, are:

> Sec. 5912 (R. S. 3190). "Proceedings on Distraint,"
>
> Sec. 5919 (R. S. 3197). "Proceedings for Seizure and Sale of Real Estate for Taxes," and
>
> Sec. 5929 (R. S. 3207). "Proceedings in Chancery to Subject Real Estate to Payment of Tax."

But the word "proceedings" is not used in the statutes themselves.

The result of respondent's construction, if adopted, would be arbitrary action and the elimination of all consideration of the merits of the case after the making of the assessment. It would result in great hardship to taxpayers to have their property seized and sold without an opportunity to delay as much as a day to raise the money to pay the assessment, or else it would operate to deprive the Government of its revenue by barring the collection after assessment.

Conceding for the sake of argument that the construction of Section 250 (d) is doubtful; even so, the rule in cases of doubtful construction is not that "the doubt is to be resolved in favor of the taxpayer," as stated in respondent's brief, with a quota-

tion from 22 Cyc. 1605. It is only where there is doubt as to whether the statute levies a tax upon a particular person or thing that the doubt has been resolved in favor of the taxpayer by this court. *Gould* v. *Gould*, 245 U. S. 151. There is no question in this case that the respondent is a taxable person or that the dividends received by him were taxable as income. *United States* v. *Phellis*, 257 U. S. 156. He is seeking exemption from taxation through a technicality, and such exemptions are to be strictly construed against the person claiming the exemption. *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146. To exempt a taxpayer from an admitted tax by reason of a limitation on remedy is to create inequality among taxpayers in favor of those who delay the payment of taxes and against those who promptly make return and pay. All doubts should be resolved against such an inequality.

IV.

RESPONDENT CAN PAY THE TAX AND FILE A CLAIM FOR THE REFUNDING THEREOF UNDER SECTION 252 OF THE REVENUE ACT OF 1921, AS AMENDED BY THE ACT OF MARCH 4, 1921 (PUBLIC NO. 527).

Replying to the argument in respondent's brief that there is no statute under which he can file a claim for refund if he pays the tax, we invite the attention of the court to Section 252 of the Revenue Act of 1921, as amended by the Act of March 4, 1923 (Public No. 527), under the provisions of which respondent can file a claim for refund at any time within two years after the payment of the tax. The

material parts of Section 252, as amended, are quoted on page 3 of petitioners' main brief. Under Section 252, as amended, respondent can file a claim for refund or credit within two years after payment of the tax, and if his claim is rejected or held by the Commissioner for six months without a decision, he can commence a suit for the recovery back of the tax under Section 3226 of the Revised Statutes, as amended by Section 1318 of the Revenue Act of 1921, and the Act of March 4, 1923, quoted in petitioners' main brief on page 4 (see also T. D. 3462, amending Article 1039, Regulations 62, Income Tax, 1922 Ed.; T. D. 3463, amending Article 1050, Regs. 63; and T. D. 3457, dated March 17, 1923).

V.

THE CASES CITED BY RESPONDENT FAIL TO SUPPORT HIS POSITION.

The case of *Woods* v. *Llewellyn*, 252 Fed. 106, 109, cited on page 22 of respondent's brief in support of his contention that the assessment must be made within three years after the due date of the return is not in point. In that case the tax for 1913 was assessed in May, 1915, and the court held that the assessment *"was in time under Paragraph E if the plaintiff's return was 'false.'"* (Italics ours.) The court did not hold that an assessment made after three years from the due date of the return would not have been in time if the discovery had been made within three years.

In *Hill* v. *Wallace*, 259 U. S. 44, no tax was assessed by the Commissioner or sought to be collected by the collector. The collection of a tax was not therefore restrained, because none had been asserted.

The case of *Ledbetter* v. *Bailey*, 224 Fed. 375, 380, 381, cited in respondent's brief at page 30, involved the collection of a "penalty" under Section 35 of the National Prohibition Act, and not a tax for revenue purposes. It was in harmony with the decision of this court in *Lipke* v. *Lederer*, 42 Sup. Ct. 549, but it is inapplicable to the facts in the case at bar.

The quotation from the opinion of the district court in *Polk* v. *Page*, 276 Fed. 128, 133, cited on page 30 of respondent's brief, is not entitled to weight because the decision of the district court was reversed by the Circuit Court of Appeals for the First Circuit in *Page* v. *Polk*, 281 Fed. 74 (see also *Nichols*, v. *Gaston et al.*, 281 Fed. 67), in which the Circuit Court of Appeals for the First Circuit held that a suit for the purpose of restraining the collection of a federal estate tax could not be maintained, even though the collection by distraint was premature.

In *Frayser* v. *Russell*, Fed. Cas. No. 5067, 20 Fed. Cas. 728, 3 Hughes 227, cited by respondent at page 31, the collection of the tax was enjoined because, in the language of the court, "the proper tax had already been paid" and the additional tax "was a demand for what this court had solemnly and finally in another case adjudicated not to be a tax." Quite different from the case at bar where the assessment

sought to be collected has been "solemnly and finally in another case" (*United States* v. *Phellis*, 257 U. S. 156) *adjudicated to be a tax.* Moreover, as stated by Mr. Justice Blatchford in *Kensett* v. *Stivers*, 10 Fed. 527, after citing cases in support of the principle that the collection of a tax can not be restrained, "That case does not impugn the principles laid down in the other cases already cited; and that, if it did, the weight of authority is against it."

Ogden City v. *Armstrong*, 168 U. S. 224, cited in respondent's brief at page 32 did not involve a federal tax.

CONCLUSION.

Section 3224, R. S., was adopted by Congress in pursuance of the sound public policy that there should be no unnecessary delays in the collection of the public revenue.

The principle that the collection of Federal taxes could not be restrained had come to be so thoroughly understood and accepted by the legal profession and the general public that suits for injunctions were very rare after the decision of this court in *Snyder* v. *Marks*, 109 U. S. 189, up to the time of the publication of the opinion of the district court in this case (*Du Pont* v. *Graham*, 283 Fed. 300), and the decision of the District Court of the United States for the District of Rhode Island in the case of *Polk* v. *Page*, 276 Fed. 128 (reversed by the Circuit Court of Appeals for the First Circuit in *Page* v. *Polk* et al., 281 Fed.

74). Since these decisions, equity suits to enjoin the collection of taxes have sprung up as mushrooms. We append a list of these cases, and they will show how great the burden will hereafter be upon this and other Federal courts, if this remedy for an injunction is permitted in violation of the Act of Congress.

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APRIL, 1923.

APPENDIX.

Suits for Injunction to Restrain the Collection of Taxes.

1. *Weingold et al.* v. *Bowers*, So. Dist. New York. Filed March, 1922 (5 cases).

These were known as the "Furrier Cases." They were the outgrowth of a conspiracy to defraud the Government. A former deputy collector counterfeited the "received payment" stamp used in the office of the Collector of Internal Revenue in New York, and with it stamped the monthly lists of sales of manufacturers of fur garments to show that the sales tax thereon had been paid. His plan was to accept 80% of the amount of tax due the Government and to allow the furriers the balance as their profit from the transaction. When the fraud was discovered all unpaid taxes were assessed against the furriers and warrants of distraint issued to enforce collection. To prevent the attachment of their property the furriers filed bills in equity to restrain the collection of the taxes. Hon. Julian Mack, District Judge, granted temporary restraining orders in each case. The temporary restraining orders have since been dissolved. The taxes have been collected and some of the furriers have been convicted under the penal provisions of the revenue laws. These cases are unreported.

2. *Solomon Brodsky* v. *Ferguson, Coll'r.* Filed July, 1922, Dist. New Jersey (unreported).

Solomon Brodsky was alleged to have made large profits from the bootlegging business. He kept no books that could be found and made no returns of his profits for the purpose of the income tax. The only available method of determining his profits was by an examination of his bank account and an estimate of the amount of net income based upon the total amount of his deposits for the year. This method was followed and an assessment made and payment demanded, with threats of collection by distraint. Brodsky filed a bill in equity to restrain the collection of the income tax so assessed. This bill was afterwards dismissed and the tax collected.

3. *Union Fishermen's Cooperative Packing Co.* v. *Huntley,* Dist. of Oregon. Filed January, 1923 (unreported).

This was a bill in equity to restrain the collection of an additional assessment of income tax based on a disallowance of an amount of depreciation claimed by the taxpayer. On the defendant's motion to dismiss the bill of complaint the motion was granted by District Judge Wolverton, who handed down a brief opinion holding that such a proceeding is barred by Section 3224, R. S.

4. *Allan Black* v. *Rafferty, Collector.* Filed February, 1923, Eastern District New York.

This was another bootlegger case. The additional assessment of income tax was in the sum of $525,768.43, the payment of which was demanded by the collector, with threats of distraint upon plaintiff's property unless the same was paid in compliance with the demand. On motion to dismiss

the bill District Judge Garvin granted the motion, holding that the case was not within the decision in the duPont case, or within the decision of the Supreme Court in the cases of *Regal Drug Corporation* v. *Wardell*, and *Lipke* v. *Lederer*. (Unreported, T. D. 3456.)

5. *People's Savings Association* v. *Nauts, Coll'r.*
Filed March, 1923, Northern District Ohio.

This is a suit in equity to restrain the collection of capital-stock taxes on the ground that the plaintiff, being a domestic building and loan association not operating for profit, it is not subject to the tax. A motion has been made to dismiss the bill of complaint, but decision thereon is being deferred by District Judge Killitts.

6. *Rock Island Butter Co.* v. *Nauts, Coll'r.*
Filed August, 1922, Northern District Ohio.

This is a suit for injunction to restrain the collection of a special tax as a manufacturer of adulterant butter, on the ground that the plaintiff is not such a manufacturer. A motion has been made to dismiss the bill, but decision on the motion is being deferred by Judge Killitts.

7. *Chicago Fig & Date Co.* v. *Cannon, Coll'r.*
8. *T. N. Catrevos & Co.* v. *Cannon, Coll'r.*
Dist. Court, No. Dist. Illinois.

These are suits for injunction to restrain the collection of the manufacturers' sales tax on candy, on the ground that stuffed dates manufactured by the plaintiffs are not candy within the meaning of the act. Motions have been made to dismiss the bills of complaint, but decision thereon has been deferred by the court.

9. *Alice N. Whiting* v. *Woodworth, Coll'r.* Filed October, 1922, Eastern District of Michigan.

This is a suit for injunction to restrain the collection of an income tax assessed against the plaintiff on account of income received by her in the form of stock of the General Motors Corporation. The case is practically on all fours with the du Pont case and is being held in abeyance pending the decision of the latter case.

10. *Hernandez* v. *McGhee.* Filed June, 1922, District of New Mexico.

The collection of income tax in this case was restrained by District Judge Neblett. The tax was for the year 1913, but no return was made by the delinquent taxpayer. The case is now pending on appeal in the Circuit Court of Appeals for the Eighth Circuit, and will be heard at St. Paul during the May term.

11. *Lloyd W. Seaman* v. *Bowers, Coll'r.* Filed February, 1923, Southern District of New York.

This is a suit for injunction to restrain the collection of an income tax. A temporary restraining order was granted by Judge Learned Hand. Plaintiff's motion for a preliminary injunction and defendant's motion to dismiss the bill of complaint were argued to Judge Augustus Hand. The matter is still pending.

12. *Ansco Co.* v. *Gage, Coll'r.* Filed February, 1923, Eastern District New York.

In this case District Judge Cooper has issued a temporary restraining order to restrain the collection by the collector of an assessment of income tax against the plaintiff and to restrain the collector from

proceeding against the taxpayer's bondsmen. The temporary restraining order is still in effect.

13. *Isaac Baker* v. *Olson, Coll'r.* Filed September, 1922, District of North Dakota.

This is a suit for injunction to restrain the collection of an income tax. On defendant's motion to dismiss the bill the motion was granted and the plaintiff appealed to the Circuit Court of Appeals for the Eighth Circuit. The case is now pending on appeal.

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GRAHAM, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, ET AL. *v.* DU PONT.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 846. Argued April 30, 1923.—Decided May 21, 1923.

1. Under § 3224, Rev. Stats., federal taxing officers who, in the course of general jurisdiction over the subject-matter, have made an assessment and claim that it is valid, cannot be enjoined from collecting the tax upon the ground that the assessment is illegal. P. 254.
2. One who would contest the validity of a federal tax upon the ground that the assessment and the right to distrain were barred by a statutory time limitation, should pay the tax and sue to recover it, and not seek relief by a suit to enjoin the Collector from distraining for the tax. P. 255.
3. Under § 252 of the Revenue Act of 1918, reënacted in the Revenue Act of 1921, a taxpayer whose return of income was due March 15, 1916, and against whom an additional assessment was made December 31, 1919, could pay the amount of the assessment, make his claim therefor, and, if that were rejected, have at least until March 15, 1921, within which to sue to recover back the payment. P. 256.
4. A taxpayer cannot, by delaying payment of an assessment until his right to sue to recover it back is barred by limitations, make a case so extraordinary and entirely exceptional as to render Rev. Stats., § 3224, inapplicable to his suit to enjoin collection by distraint. P. 256. *Lipke* v. *Lederer*, 259 U. S. 557; *Hill* v. *Wallace*, *id.* 44, and other cases distinguished.
5. A taxpayer, whose income return for the year 1915 was filed before March 15, 1916, and who was assessed additionally, December 31, 1919, and, on March 8, 1920, filed a claim for abatement

of such assessment as void, because not made within the statutory time limit therefor and because made on a dividend of corporate shares which were not income (involving a question afterwards determined adversely in *United States* v. *Phellis*, 257 U. S. 156,) *held*, entitled under § 252 of Revenue Act 1921, and § 3226, Rev. Stats., as amended by Revenue Act of March 4, 1923, c. 276, 42 Stat. 1504, to pay the tax assessed, bring suit to recover it back, and, in such suit to raise questions as to the value of the stock, and the amount of resulting tax, and also as to whether the assessment was barred by statutory time limitation. P. 258.

284 Fed. 1017, reversed.

This is a proceeding by certiorari to review the action of the Circuit Court of Appeals of the Third Circuit in affirming on appeal a temporary injunction granted by the District Court of Delaware restraining the then Collector of Internal Revenue for the District of Delaware from levying a distraint against the property of the complainant, Alfred I. duPont, to collect the sum of $1,576,015.86 assessed against him by the Commissioner of Internal Revenue.

In a reorganization of a Dupont Powder Company of New Jersey and the organization of a new Dupont Powder Company of Delaware to take over many of the assets of the old company, the complainant in the year 1915 received 75,534 shares of the common stock of the Delaware Company of the par value of $100 each. The transaction was the subject of consideration by this Court in *United States* v. *Phellis*, 257 U. S. 156, where it was determined that shares in the Delaware Company received by stockholders of the New Jersey Company, as the complainant received his, at the rate of two in the Delaware Company in exchange for one in the New Jersey Company, was a separation of past accumulation of profits from the capital of the New Jersey Company and a distribution to the stockholders, and thus constituted taxable income under the Income Tax Law of 1913.

The complainant filed a return and an amended return

in March, 1916, of his income for the year 1915, in which he did not include these shares. In November, 1917, the Department began an investigation into the liability of the complainant to pay an income tax on his shares of stock in the Delaware Company and finally ordered an assessment of $1,576,015.86. The complainant was notified of this assessment made December 31, 1919. He replied the next day that as his return for 1915 was filed before March 15, 1916, and as the law required any assessment for additional amount to be made within three years, and that period had expired, the assessment and demand for payment were illegal. On February 2, 1920, a hearing was granted to counsel for complainant by the Commissioner of Internal Revenue.

On March 8, 1920, complainant filed a claim for the abatement of the assessment of $1,576,051.86 as void because made after the limitation of three years had expired and because the tax was on something that was not income under the law.

Thereafter by agreement between the stockholders similarly situated, one stockholder, Phellis, paid the tax due under a similar assessment and brought suit in the Court of Claims to recover it. Counsel for the complainant herein took part in the argument of that case. The Court of Claims gave judgment against the United States, but on appeal the judgment was reversed. The opinion of the Court was handed down November 21, 1921. All claims for abatement had been held and not decided by the Commissioner under an agreement with the counsel in the *Phellis Case*. Thereafter the Commissioner rejected complainant's claim for abatement. The bill of complaint was filed January 30, 1922. The District Court granted the temporary injunction. The Circuit Court of Appeals on appeal affirmed the temporary injunction for the reasons stated in the opinion of the District Court.

Mr. Solicitor General Beck, with whom *Mr. Nelson T. Hartson* and *Mr. Chester A. Gwinn* were on the briefs, for petitioners.

The suit in this case has for its purpose the restraining of the collection of a federal tax, and it cannot be maintained.

The only relief prayed for in the bill was injunction to restrain the collection of the tax. It is true that there was a general prayer for relief, but any relief given under a general prayer must be agreeable to the case made by the bill. *Allen* v. *Pullman's Palace Car Co.*, 139 U. S. 638, 662. In this instance respondent sought a preventive remedy only.

If § 3224 had never been enacted, it is possible that the collection of a federal tax might be restrained in cases where the remedy at law is doubtful, although from an examination of the cases arising prior to its enactment, it appears that the United States courts were unanimous in holding that the collection of a federal tax could not be restrained by injunction, regardless of the absence of any express legislative enactment inhibiting such relief. *Roback* v. *Taylor*, 4 Int. Rev. Rec. 170; *McGee* v. *Denton*, 5 Blatchf. 130; *United States* v. *Pacific R. R.*, 4 Dill. 66.

Since the enactment of § 3224 (originally § 10, Act of March 2, 1867, c. 169, 14 Stat. 475), the District and Circuit Courts have had occasion to construe and apply it in many cases, and it may be said without fear of successful contradiction that there can not be found in the federal reports to-day a single decision standing unreversed or unmodified where injunction has been granted to restrain the collection of a federal tax.

On the other hand, the cases are practically unanimous in holding that the inhibition of § 3224 applies to all assessments of taxes made under color of their offices by internal revenue officers charged with general jurisdiction

of the subject of assessing taxes. *Snyder* v. *Marks*, 109 U. S. 189, 193; *Pacific Whaling Co.* v. *United States*, 187 U. S. 447; *Corbus* v. *Alaska Gold Mining Co.*, 187 U. S. 455; *Dodge* v. *Osborn*, 240 U. S. 118; *Dodge* v. *Brady*, 240 U. S. 122; *Bailey* v. *George*, 259 U. S. 16.

This Court will not confuse the case at bar with the recent cases of *Lipke* v. *Lederer*, 259 U. S. 557, and *Regal Drug Corporation* v. *Wardell*, 260 U. S. 386, in which the collection of *penalties* under § 35 of the National Prohibition Act was restrained, or with *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, and *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, which were suits by stockholders against the corporation in which they held stock.

Nor does *Hill* v. *Wallace*, 259 U. S. 44, support this suit, because this Court sustained that case as a stockholders' suit against a corporation to restrain the payment of so-called "taxes," adjudged to be beyond the taxing power under the Constitution, and therefore within the rule laid down in the *Pollock* and *Brushaber Cases*. This Court held that the statute laying the taxes in the case of *Hill* v. *Wallace* was not a taxing act, but an act to regulate grain exchanges. The exaction was not, therefore, strictly speaking, a "tax," nor had there been any assessment by the Commissioner of Internal Revenue or attempt by the collector of internal revenue to collect an assessment. The effect of the decision was not, therefore, to restrain the collection of a tax.

The effect of § 3224, Rev. Stats., as construed and applied by this Court, may be summed up as follows: If the assessment is of a tax for revenue purposes, made and attempted to be enforced by the proper revenue officers of the United States under color of their offices, its collection can not be restrained by injunction. *Cheatham* v. *United States*, 92 U. S. 85; *State Railroad Tax Cases*, 92 U. S. 575; *Snyder* v. *Marks*, 109 U. S. 189; *Pacific Whaling Co.* v. *United States*, 187 U. S. 447: *Corbus* v. *Alaska*

Gold Mining Co. 187 U. S. 455; *Dodge* v. *Osborn,* 240 U. S. 118; *Dodge* v. *Brady,* 240 U. S. 122; *Bailey* v. *George,* 259 U. S. 16.

Respondent's remedy at law was plain, adequate, and complete, and was not, and is not, barred by any provision of the Revenue Act of 1921, or any other statute.

The District Court was clearly right in denying plaintiff relief on the grounds: (1) That the assessment was illegal and invalid in that it was not made within three years after the due date of the return; *Eliot National Bank* v. *Gill,* 210 Fed. 933; *Penrose* v. *Skinner,* 278 Fed. 284; *Snyder* v. *Marks,* 109 U. S. 189; (2) that the amount of the assessment was larger than it should have been; *Phellis* v. *United States,* 56 Ct. Clms. 156; *Snyder* v. *Marks,* 109 U. S. 189; Rev. Stats., § 3224; (3) that the assessment constituted a cloud upon respondent's title to his lands; Rev. Stats., § 3224; *Dodge* v. *Osborn,* 240 U. S. 118; (4) that the enforcement of the assessment and demand would result in great hardship to respondent. *Calkins* v. *Smietanka,* 240 Fed. 138; *Markle* v. *Kirkendall,* 267 Fed. 498.

The reason assigned by the District Court, absence of adequate legal remedy, gives no effect whatever to § 3224, but attempts to decide the case on general principles of equity. Furthermore, it is incorrect.

Section 252, Revenue Act 1921, did not bar respondent from his remedy at law; and, even if it did, the bar has been removed by the amendment of March 4, 1923.

The court below held that the first proviso of § 252 constituted a bar to respondent's remedy at law because more than five years had elapsed since the due date of the income-tax return, and the tax was still unpaid; therefore, if respondent had paid the tax after such five years, he could not have claimed a refund because, under the first proviso of § 252, the Commissioner of Internal Revenue was not authorized to allow a credit or refund after such five years.

The construction of the court below was contrary to the contemporaneous construction of the Department at the time the bill was filed, which was later published in T. D. 3416, approved December 16, 1922.

But the previous construction is immaterial now, because by the amendment of March 4, 1923, Congress has authorized the Commissioner to allow a refund or credit in any case where the claim is filed within two years after the payment of the tax, even if the payment is more than five years after the due date of the return.

Section 250 (d), Revenue Act 1921, does not bar the collection by distraint after, if the assessment is made before, the expiration of five years after the date when the return was filed. Section 1320 of that act, cited in the opinion of the court below, does not apply to income taxes.

Distraint is not a "proceeding" within the meaning of § 250 (d) to the effect that "no suit or proceeding for the collection of any such taxes . . . shall be begun, after the expiration of five years after the date when such return was filed." The "proceeding" referred to therein is obviously a judicial proceeding.

This Court indicated by its language in *Dodge* v. *Osborn*, referring to § 3224, that there might possibly arise a case where "by some extraordinary and entirely exceptional circumstance its provisions are not applicable." Such a case had apparently not come to the attention of this Court up to the time of its decision in *Dodge* v. *Osborn*, but the kind of case it evidently had in mind was such as *Lipke* v. *Lederer*, 259 U. S. 557, where this Court held that the exaction was not a "tax," and that § 3224 did not apply. Such a case might also arise where an unauthorized person attempts without color of office or of law to enforce distraint for the collection of an alleged tax; but it can never apply in a case like the one at bar, where the tax in some amount was indisputably due under a decision of this Court, *United States* v. *Phellis*, 257

U. S. 156; the amount of the assessment was correct under a decision of the Court of Claims, *Phellis* v. *United States*, 56 Ct. Clms. 157; the assessment was made by the Commissioner of Internal Revenue and claimed by him to be correct; and the collection was attempted by a method prescribed by law and by an officer authorized by law to make such collections. *Snyder* v. *Marks*, 109 U. S. 189; *Kensett* v. *Stivers*, 10 Fed. 517.

Mr. William A. Glasgow, Jr., with whom *Mr. Henry P. Brown* was on the brief, for respondent.

The alleged assessment under authority of which the distraint is proposed to be made, is without authority of law, illegal and void. The threatened seizure and sale of respondent's property will be illegal and invalid, unless the tax claimed has been duly and properly assessed and the threatened proceedings are authorized by statute. *Williams* v. *Peyton*, 4 Wheat. 77; *Early* v. *Doe*, 16 How. 610; *Ronkendorff* v. *Taylor's Lessee*, 4 Pet. 349; 37 Cyc. 1231.

Under the Income Tax Act of 1913, § E, 38 Stat. 169, and Rev. Stats., § 3176, as amended by that act, 38 Stat. 179, the assessment was illegal because: (1) The only return alleged by petitioners to have been made upon behalf of respondent, was not made until July, 1919, or thereafter. (2) The alleged return relied upon by the petitioners was not such a return as was contemplated by the act, as it was not made by the persons designated or in the manner prescribed. (3) The assessment was not based upon the alleged return. (4) The assessment was not made until December, 1919.

The Commissioner not only failed to comply with the requirements of the law, but was without any jurisdiction whatever to make that assessment at the time that it was made. Under these circumstances the assessment is not merely irregular but void. *Ogden City* v. *Armstrong*, 168 U. S. 224.

It follows that there is no basis for any summary proceedings by distraint to enforce payment of the additional tax claimed by the petitioners.

The petitioners' contention that the three-year period referred to in § E, Act of 1913, relates merely to the time within which the discovery of the omission of income must be made is erroneous; the period relates to the time within which the Commissioner must file a return.

Under their construction, if any error was discovered by the Commissioner within three years, he would have had authority at any time thereafter, no matter how remote, to make a return and assessment and proceed to collect the tax by summary process. His authority to proceed by summary proceedings, would not necessarily be determined by any matter of record, but would depend entirely upon whether he or his predecessor in office had knowledge of the error within the three-year period. The burden would be upon the taxpayer to disprove such knowledge and this whether the Commissioner was alive or dead or otherwise unobtainable as a witness. Thus every case wherein a return was filed after the three-year period would necessarily involve the question of fact as to whether the alleged error had been discovered within said period by the Commissioner then in office. *Woods* v. *Llewellyn*, 252 Fed. 106; *Eliot National Bank* v. *Gill*, 218 Fed. 600; *Penrose* v. *Skinner*, 278 Fed. 284; Montgomery's Income Tax Procedure, ed. 1922, p. 196, footnote 17.

The threatened distraint would be in violation of the express inhibition of § 250 (d), Revenue Act 1921.

On January 30, 1922, when this proceeding was instituted, more than five years had expired since March 1, 1916, when respondent's return was filed, and a distraint or seizure of his property at that time would have constituted a "proceeding" within the inhibition of that section.

That this is the proper construction of its provisions appears unmistakably from the fact that they forbid a determination and assessment after the five year period "unless both the Commissioner and taxpayer consent in writing to a later determination, assessment and collection of the tax." In other words, it was recognized by Congress that consent to merely a determination and assessment of the tax after the five year period would be futile, because even if the tax should be thus determined and assessed, its collection would still be impossible because of the provisions forbidding the commencement of "any suit or proceeding for the collection" of the tax after the five year period. In order to make the consent of the taxpayer effective, therefore, it was provided that it should relate not only to the determination and assessment of the tax but to its collection.

That the phrase "proceeding for the collection of any such taxes" as used in § 250 (d) contemplates a collection by distraint, is also evidenced by other provisions of the Revised Statutes. See §§ 3190, 3187, 3196, 3197, 3207. These designate the proceedings which are available to the Collector for the collection of a tax, and are obviously contemplated by the inhibition of § 250 (d) against any "proceeding for the collection of any such taxes."

Congress could have had no reasonable object in prohibiting, after the five year period, such a suit as is contemplated by § 3207, while allowing a distraint or seizure after that period under §§ 3187 and 3196. Likewise, if, as petitioners claim, Congress had intended to impose no time limit upon the right of the Government to collect a tax by distraint, provided an assessment had been made within five years from the time the tax was due, it is difficult to understand why, in a case where such an assessment had been made, Congress expressly prohibited the collection of such tax by suit after the expiration of said period.

The remedy of distraint has always been the customary method employed to collect taxes, and it has been only in very exceptional cases that the Government has ever resorted to suit. What purpose could Congress have had in mind in depriving the Government of an extraordinary remedy rarely used, while leaving unaffected the customary proceeding by distraint? The obvious intention of Congress was to protect the taxpayer. But what possible reason could there be for protecting him against procedure almost never employed by the Government, if no protection was to be afforded him against the usual and ordinary method of proceeding by distraint?

Also, under the theory advanced by the petitioners, the words " or proceedings " would have comprehended only that which would be included in the ordinary definition of the word " suit," and would, therefore, have been mere surplusage.

The provisions of § 250 (d) which require determination and assessment of the tax within the five-year period, obviously relate to the functions of the Commissioner and impose restrictions upon his authority; while it is equally apparent that the provisions which enjoin any suit or proceeding for the collection of the tax after the prescribed period, relate to the functions of the Collector and are intended to impose restrictions upon his authority to collect taxes which have been assessed by the Commissioner, regardless of the method of collection adopted.

Moreover, while we contend that the limitation imposed by § 250 (d) applies whether or not there has been an assessment, we also take the position, already explained, that the assessment relied upon by the petitioners is illegal and void and that the situation is the same as though no assessment had been made. If this contention is correct, it is immaterial whether or not distraint is contemplated by the word " proceeding ", as neither assessment nor distraint would have been made within the five-year period.

We submit, therefore, that the express language and obvious purpose of § 250 (d), was to afford the honest taxpayer, after the expiration of the five-year period, protection against the institution of any proceedings whatever, whether by distraint or otherwise, which have for their object the collection of a tax, and regardless of whether there had or had not been an assessment.

We also submit that the foregoing argument demonstrates the correctness of our first principal proposition, that a distraint by the petitioners for the purpose of collecting the additional income tax claimed to be due from respondent for the year 1915, would be without authority of law and in violation of express statutory inhibition.

Section 3224, Rev. Stats., does not preclude the respondent from equitable relief.

The "extraordinary and entirely exceptional circumstances" referred to in *Hill* v. *Wallace*, 259 U. S. 44, consisted of the fact that failure to pay the tax would subject the taxpayer "to heavy penalties" and that recovery of the amount paid by the Board of Trade "would necessitate a multiplicity of suits and, indeed, would be impracticable."

In the present case the "extraordinary and entirely exceptional circumstances" making § 3224 inapplicable are as follows: (1) The Commissioner had no jurisdiction to make the assessment relied upon and the assessment was, in consequence, void. (2) Section 3224, when construed in connection with § E of the Act of 1913 and with § 250 (d) of the Act of 1921, does not forbid equitable relief under circumstances such as exist in the present case. (3) Unless the respondent is afforded equitable relief, he will be without legal remedy or such remedy would be inadequate.

We have already shown that the Commissioner had no jurisdiction to make the assessment. The following cases show that under such circumstances § 3224 has no appli-

cation: *Ledbetter* v. *Bailey*, 274 Fed. 375; *Polk* v. *Page*, 276 Fed. 128; *Page* v. *Polk*, 281 Fed. 74 (reversed on another aspect); *Nichols* v. *Gaston*, 281 Fed. 67; *Frayser* v. *Russell*, Fed. Cas. No. 5,067; *Ogden City* v. *Armstrong*, 168 U. S. 224.

The foregoing cases show that § 3224 is applicable when the injunctive relief prayed for is dependent upon mere errors or irregularities in the assessment which do not go to the foundation of the tax. In such cases it may be properly said that provided the assessment is made under color of their offices by proper government officials charged with general jurisdiction of the subject of assessing taxes, the taxpayer is remitted to his legal remedy if there be one. When, however, it is no mere error or irregularity in the assessment, which is complained of, but upon the contrary a complete want of jurisdiction in the Commissioner to make the assessment and the assessment is in consequence void, § 3224, is not applicable.

It may be said of the federal tax system, as it was said in effect, in *Ogden City* v. *Armstrong, supra*, in reference to the laws of Utah, that the system prescribed by the United States with respect to the collection and refund of taxes, is intended to apply in all cases where the tax is properly assessed and collected, or where there is a mere irregularity or error in the assessment or collection which does not go to the foundation of the tax. But that, where the assessment and, in consequence, the tax is wholly void and illegal, the statutes and their remedies for errors and irregularities have no application.

Section 3224, Rev. Stats., when construed in connection with § E, Revenue Act 1913, and with § 250 (d), Revenue Act 1921, does not forbid equitable relief under circumstances such as exist in the present case.

As already shown, § E of the Act of 1913, authorizes assessment, in the case of "false" returns, within three years after the return was due, while § 250 (d) of the

Revenue Act of 1921, expressly prohibits "any suit or proceeding for the collection" of the tax after five years from the date the return was filed. These provisions were enacted for the purpose of protecting the taxpayers against assessment and against any summary proceeding instituted to collect the tax, after the three and five years periods had elapsed. Can the petitioners successfully maintain that it was the intention of Congress that the taxpayer should be without any means of availing himself of this protection in case the government officials chose to disregard the statutory limits imposed upon their authority?

Unless the respondent is entitled to equitable relief, he can in no way obtain the protection intended to be afforded him by Congress and the statutory limitations imposed upon the authority of the Commissioner and Collector would be meaningless. Unless the Court may exercise its restraining influence in such a case as the present, there would be, in effect, no limitation upon the period during which an assesment or distraint might be made.

Such a result, so manifestly opposed to the intention of Congress, may be avoided by reading § 3224, and the Acts of 1913 and 1921, together and in the light of the authorities already cited. When so construed, § 3224 applies when the complaint is of some mere error or irregularity in the proceeding or an improper exercise of discretion upon the part of a government official, but does not forbid relief when the threatened distraint is not only based upon a void assessment but is also expressly forbidden by statute.

Revised Statutes, § 3224, provided that no injunction shall issue to restrain the assessment or collection of any tax, and by a later statute (Act of 1921) it is provided that no suit or proceeding shall be begun for the collection of any taxes after the expiration of five years after the

date when the return was filed. It would seem obvious that the only way to enforce the provisions of the Act of 1921 would be by injunction if the Collector undertook to violate its provisions, and therefore § 3224 and the Act of 1921, should be read together, and in a case where the limitation bars the officer's right to proceed, it should be held that the provisions of the Act of 1921 supersede § 3224.

Unless the respondent is afforded equitable relief, he will be without legal remedy or such remedy would be inadequate, for the following reasons:

(a) The right given to the respondent by § E, Revenue Act 1913, to be protected against assessment after the expiration of the three-year period, and the right given him by § 250 (d), Revenue Act 1921, to hold his property free from seizure and distraint after five years from the date when his return was filed, cannot be enforced in a court of law.

(b) There is no statutory provision under which the respondent may file a claim for refund, which is a condition precedent to the institution of suit.

(c) Assuming, for argument's sake, that a legal remedy would be available to the respondent, it would be inadequate to compensate him for the loss of his freehold.

The statutory provisions in question confer upon the taxpayer a substantial right, the right to hold his property free from seizure and distraint after the five year period, and the only way in which the respondent may enforce this right and obtain the protection intended to be afforded him by § 250 (d), is by asserting the provisions of that section as a bar to the collection of the tax.

Moreover it would appear that the only right given to the taxpayer by that section, is the right to oppose the collection of the tax after the five year period, and that if this right cannot be successfully asserted as a bar to collection, it becomes ineffective for any purpose whatever.

for it is at least extremely doubtful whether such right as is given by § 250 (d) could be made the basis of a suit by a taxpayer to recover the amount of a tax which has been collected. In such a suit the Government would contend that its *right* to the tax was not impaired by § 250 (d), and that that section relates solely to remedy and gave the taxpayer merely a personal defense which he had been unable to successfully interpose to the collection of the tax.

As against the threatened distraint proceedings, the only way in which respondent may interpose the right or defense afforded by § 250 (d) is by a proceeding in equity.

A like argument applies to the enforcement of the right given respondent by § E, Revenue Act 1913, to be protected against assessment after the three year limitation.

There is no statutory provision under which the respondent may file a claim for refund, which is a condition precedent to the institution of suit. Section 3226, Rev. Stats., as amended by Revenue Act 1921, provides that no suit or proceeding shall be maintained for the recovery of any tax, " until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof." Section 3228, as amended by the Act of 1921, is the only statute under which a claim for refund may be filed which will afford a basis for a suit and this section does not apply to a claim for refund of taxes paid under the Revenue Act of 1913.

Assuming, for argument's sake, that a legal remedy would be available to the respondent, it would be inadequate to compensate him for the loss of his freehold. *Ogden City* v. *Armstrong*, 168 U. S. 224.

We submit, therefore, that the present case falls within the category of extraordinary and exceptional cases which

have been held by this Court not to be within the inhibition of § 3224, Rev. Stats.

It is submitted that there is not the slightest similarity between the facts in *Snyder* v. *Marks*, 109 U. S. 189, and those in the present case. Moreover, in that case, this Court held that § 3224 forbids injunctive relief only when the tax claimed " is in a condition to be collected as a tax," and that " the list shows a tax which the appellant might be liable to pay, and one which the commissioner had general jurisdiction to assess against him," (109 U. S. at 192, 193), whereas in this case the claim is for a tax which the collector is expressly forbidden to attempt to collect by any " suit or proceeding."

In discussing the technical legal points of the present case, one is apt to lose sight of the substantive merits of the respective positions of the parties.

The facts show that the alleged return is not in proper form, nor made by the proper official; it was not made within three years from March 1, 1916; the alleged assessment relied upon was not even based upon the alleged return, and was likewise made after the three years period, and the tax claimed is based on a valuation of the stock far in excess of its real value.

In addition to this, we have the Act of 1921, expressly forbidding the collector from proceeding either by distraint or suit to collect any tax after five years from the date when the return was filed.

Regardless of these facts, we have the spectacle of a United States government official insisting that although his threatened actions are in express violation of statutory inhibition, they cannot be enjoined because of a technical construction of § 3224, Rev. Stats. According to his contention, he must, therefore, be permitted to collect the tax by distraint, although Congress has declared that he shall not, and respondent must be left to discover by long and tedious legal process whether or not there is any legal

remedy by which he may obtain any redress for a wrong committed in violation of express statutory inhibition.

Mr. Solicitor General Beck in reply:

The amount of the tax due to the United States from the respondent cannot be determined in a suit for injunction to restrain the collection of the assessment.

The assessment of the tax made by the Commissioner of Internal Revenue in December, 1919, was legal and its collection by distraint was not barred by § 250 (d), Revenue Act 1921, or any other statute.

Viewed either in the light of the limitation contained in § II E of the Income Tax Act of October 3, 1913, under which the tax was assessed, or under § 250 (d), Revenue Act of 1918, if applicable, the assessment of the Commissioner was made within the statutory period and was a legal assessment. The assessment was made within five years and was therefore within the limitation prescribed by the later act. Whether the Act of 1918 applied only to taxes imposed thereunder may be an open question. The return was due and was made March 1, 1916, and the assessment was made on the December, 1919, list. The assessment in this case was made under the Income Tax Act of 1913, § II E.

By the word "false," contained in § II E, is not meant "fraudulent," but merely untrue or incorrect. *Woods* v. *Llewellyn*, 252 Fed. 106; *Eliot National Bank* v. *Gill*, 210 Fed. 933; 218 Fed. 600; *National Bank* v. *Allen*, 223 Fed. 472; *United States* v. *Nashville & St. Louis Ry. Co.*, 249 Fed. 678. In any event the failure of the respondent to make a return of the income in question was a "refusal or neglect." Fraud is not essential. Respondent's return for the year 1915 was untrue and incorrect in the light of the decision of this Court in the *Phellis Case*.

Under § II E of the 1913 Act, if the discovery of the falsity of the return was made within three years the assess-

ment could be made at any time thereafter. *Eliot National Bank* v. *Gill*, 218 Fed. 600; *Penrose* v. *Skinner*, 278 Fed. 284. This agrees with the departmental construction of the Act of August 5, 1909, and the Act of October 3, 1913, and such has been the continuous and uniform construction of the Department ever since the enactment of said statutes.

Respondent raises other questions, such, for example, as that § II E of the Income Tax Act of 1913, requires a "return on information" to be made by the Commissioner, and that the return in this case was not (*a*) in the prescribed form, (*b*) made by the Commissioner himself or the collector or deputy collector, but was made by a revenue agent, (*c*) made within three years after the due date of the return, and (*d*) did not show the exact amount of tax as was shown by the assessment. These objections to the form and manner of making the assessment are not entitled to consideration in this form of proceeding. At the most, they affect merely the regularity of the assessment.

Nothing could be better settled by the decisions of this Court than that neither the accuracy nor the validity of an assessment of a tax can be determined in a suit for injunction to restrain its collection. *Snyder* v. *Marks*, 109 U. S. 189; *Dodge* v. *Osborn*, 240 U. S. 118; *Pacific Whaling Co.* v. *United States*, 187 U. S. 447.

Distraint for the collection of the assessment would not violate § 250 (d), Revenue Act 1921, and even if it did, the remedy would not be by injunction to restrain the collection of the tax.

The respondent misconstrues § 250 (d). It does not contain a five-year limitation upon the collection by distraint of taxes due and assessed under the Act of 1913. A limitation upon two separate acts is contemplated by it: (1) upon assessment, and (2) upon a "suit or proceeding." The limitation upon judicial remedy is conditioned

upon and a part of the preceding limitation as to assessments.

Congress obviously meant that the Government could have the prescribed period of years to assess the tax, and recognizing the preëxisting law that it could sue to enforce a tax liability even though there were no assessment, it further provided, in order to make its limitation effective, that when the Government had not assessed the tax within the prescribed period it could not sue in the courts, either at common law or in equity, to enforce the unassessed liability of the taxpayer.

If, however, the taxes were assessed within the prescribed period, then the limitation as to a "suit or proceeding" had no application and a suit could be begun at any time.

This construction is in harmony with the entire scheme of taxation, for a tax when assessed has always been a definite liability, and remains a perpetual lien upon the taxpayer's real estate and it was never intended that when a tax was once assessed the taxpayer could escape by a limitation of time. To do this would be to put a premium upon the neglect to pay taxes duly assessed.

An assessment becomes a lien on all the property of the taxpayer under § 3186, and requires no judgment of a court for its satisfaction. An assessment is unnecessary as the basis of a suit to recover taxes, and a suit is unnecessary where there is a valid assessment. To hold that the right to distrain is limited to five years after the due date of the tax, as is the right to assess, would be to destroy the force and effect of an assessment, if made near the end of the five-year period. See Report, Committee on Finance, No. 275, 67th Cong., 1st sess., p. 21, part IV.

The word "proceeding" has been used over and over again by Congress in conjunction with the word "suit" to refer to judicial proceedings and to judicial proceedings alone.

Conceding for the sake of argument that the construction of § 250 (d) is doubtful; even so, the rule in cases of doubtful construction is not that "the doubt is to be resolved in favor of the taxpayer," as stated in respondent's brief, with a quotation from 22 Cyc. 1605. It is only where there is doubt as to whether the statute levies a tax upon a particular person or thing that the doubt has been resolved in favor of the taxpayer by this Court. *Gould* v. *Gould*, 245 U. S. 151. There is no question in this case that the respondent is a taxable person or that the dividends received by him were taxable as income. *United States* v. *Phellis*, 257 U. S. 156. He is seeking exemption from taxation through a technicality, and such exemptions are to be strictly construed against the person claiming the exemption. *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146.

Respondent can pay the tax and file a claim for the refunding thereof under § 252, Revenue Act of 1921, as amended by the Act of March 4, 1923.

Under § 252, as amended, respondent can file a claim for refund or credit within two years after payment of the tax, and if his claim is rejected or held by the Commissioner for six months without a decision, he can commence a suit for the recovery back of the tax under § 3226, Rev. Stats., as amended by § 1318, Revenue Act 1921, and the Act of March 4, 1923. See also T. D. 3462, amending Art. 1039, Regulations 62, Income Tax, 1922 ed.; T. D. 3463, amending Art. 1050, Regulations 63; and T. D. 3457, dated March 17, 1923.

MR. CHIEF JUSTICE TAFT, after stating the case as above, delivered the opinion of the Court.

Section 3224, Rev. Stats., provides that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." In *Cheatham* v. *United States*, 92 U. S. 85, 88; *State Railroad Tax Cases*,

92 U. S. 575, 613, and in *Snyder* v. *Marks*, 109 U. S. 189, 193, it was said that the system prescribed by the United States in regard to both customs duties and internal revenue taxes, of stringent measures not judicial, to collect them, with appeals to specified tribunals and suits to recover back moneys illegally exacted, was a system of corrective justice intended to be complete, and enacted under the right belonging to the government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares by § 3224 that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject matter in question, have made the assessment and claim that it is valid. This view has been approved in *Shelton* v. *Platt*, 139 U. S. 591; in *Pittsburgh, etc., Ry.* v. *Board of Public Works*, 172 U. S. 32; in *Pacific Steam Whaling Co.* v. *United States*, 187 U. S. 447, 451, 452; in *Dodge* v. *Osborn*, 240 U. S. 118, 121, and in *Bailey* v. *George*, 259 U. S. 16.

The District Court recognized the sweep of these decisions in respect of the contention of the complainant that the assessment of this tax and the threatened distraint to collect it were barred by limitations under the statute, and was of opinion that as a rule such attacks upon the validity of the tax could only be heard and considered after the tax had been paid in a suit to recover it back. In this view we fully concur.

The District Court, however, thought that an exception to the operation of § 3224 must arise when it appeared, as it held it did appear here, that no provision of law existed by which if the taxpayer when he filed his bill for an injunction had paid the tax assessed, he could bring a suit to recover it back because it would be barred by the statutory limitation of time in which such a suit could be brought.

The court based its conclusion on § 252 of the Revenue Act of 1918, c. 18, 40 Stat. 1085, reënacted in the Revenue Act of 1921, c. 136, 42 Stat. 268, which reads as follows:

"If, upon examination of any return of income made pursuant to . . . the Act of October 3, 1913 . . . it appears that an amount of income . . . tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income . . . taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer."

The return was due March 15, 1916. The assessment was made December 31, 1919. The complainant might then have paid the tax and would have had two years in which to make his claim, and if rejected, to sue to recover it back if, as he now submits, § 252 limited his right to pay and sue to recover. Under such a construction and application of § 252, suit must have been brought on or before March 15, 1921. This is what Phellis did (*United States* v. *Phellis,* 257 U. S. 156) and there was no question raised as to his right to bring the suit in the Court of Claims to recover back the tax paid by him if it had proved to be illegally assessed and collected. Certainly complainant could not, by delaying his payment until his right to sue to recover it back expired, make a case so extraordinary and entirely exceptional as to render § 3224, Rev. Stats., inapplicable.

If it be said that he was waiting for the Commissioner to act on his claim for abatement of the assessment, it is enough to say that the Commissioner's delay until after the decision of the *Phellis Case* in November, 1921, was

due to agreement by the parties. Nor was he prevented from paying the assessment by his claim for abatement.

The cases complainant's counsel rely on do not apply. The cases of *Lipke* v. *Lederer*, 259 U. S. 557, and *Regal Drug Corporation* v. *Wardell*, 260 U. S. 386, were not cases of enjoining taxes at all. They were illegal penalties in the nature of punishment for a criminal offense. *Pollock* v. *Farmer's Loan & Trust Co.*, 157 U. S. 429, and *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, were suits by stockholders against corporations to restrain the corporations from paying taxes alleged to be unconstitutional. *Hill* v. *Wallace*, 259 U. S. 44, was in part a suit like the foregoing. It was a bill filed by members of the Chicago Board of Trade to prevent the governing board from applying to the Secretary of Agriculture to have the Board of Trade designated as a "contract market" under the Future Trading Act on the ground that the act was unconstitutional and its operation would impair the value of the Board to its members. Without such designation, no member could have sold grain for future delivery without paying a prohibitive tax, and if he sold without paying the tax, he was subjected to heavy criminal penalties. To pay such a tax on each of the many thousands of transactions on the Board, and to sue to recover them back would have been utterly impracticable. It would have blocked the entire future grain business of the country and would have seriously injured not only the members of the Board but also the producing and consuming public. This phase of the situation was so clear that the Government in effect consented to the temporary injunction. See *Hill* v. *Wallace*, 257 U. S. 310, s. c. 615. Under these extraordinary and most exceptional circumstances, it was held that § 3224 was not applicable to prevent an injunction against collection of such a prohibitive tax imposed for the purpose of regulating the future grain

business with all the unnecessary and disastrous consequences its enforcement would entail if the act was unconstitutional. *Hill* v. *Wallace* should, in fact, be classed with *Lipke* v. *Lederer, supra,* as a penalty in the form of a tax. Certainly we have no such case here.

This conclusion renders it unnecessary for us to consider whether § 252 of the Revenue Act of 1921, in connection with § 3226, Rev. Stats., as amended by the same Revenue Act of 1921, barred complainant's right to pay the tax and sue to recover it back at the time of filing his bill, as held by the District Court. It is certain that by the amendments to § 252 and § 3226, Rev. Stats., by the Act of March 4, 1923, c. 276, 42 Stat. 1504, the complainant is given the right now to pay the tax, and sue to recover it back, and in such a suit to raise the questions as to the value of the stock and the amount of the resulting tax and also as to the bar of time against the assessment which he attempted to raise in the bill.

The decree of the Circuit Court of Appeals is reversed and the case is remanded to the District Court with directions to dissolve the temporary injunction and to dismiss the bill.

Reversed.